

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA  
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4 **In Re: Bard IVC Filters** ) MD-15-02641-PHX-DGC  
Products Liability Litigation )  
5 )  
6 ) Phoenix, Arizona  
7 ) March 31, 2016  
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21 **BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE**

22 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

23 **STATUS HEARING**  
24

25 Official Court Reporter:  
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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared with Computer-Aided Transcription

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P R O C E E D I N G S

THE COURTROOM DEPUTY: In the matter of MDL  
2015-2641, Bard IVC Filters Products Liability litigation, on  
for scheduling conference.

Will the parties please announce.

MR. BOATMAN: Good morning, Your Honor. Bob Boatman,  
Ramon Lopez, and Paul Stoller for the plaintiffs.

MR. LOPEZ: Good morning, Your Honor.

MR. STOLLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. NORTH: Good morning, Your Honor. Richard North,  
Brandee Kowalzyk, Matthew Lerner, and Jim Condo for the  
defendants.

THE COURT: Good morning.

And good morning everybody else, including those on  
the phone.

Counsel, let me mention at the start something I  
think you all are aware of. We had originally suggested that  
we should hear argument today on the motion to remand the  
Ruden, R-U-D-E-N, case, as well as the motion to dismiss by  
California Pacific Medical Center, but counsel were not  
available for that argument, so we have postponed it.

I know, Mr. Dalimante, you have a similar motion to  
remand pending, and my thought is what we ought to do is find

10:02:43 1 a time in the next few weeks when we can get counsel on all of  
2 those motions on the phone for the argument after the other  
3 motion to remand is fully briefed, and we can just deal with  
4 them all at once, if that makes sense.

10:03:01 5 MR. DALIMANTE: I have no objection to that. It is a  
6 matter of coordinating time. I'm not sure what the Court had  
7 in mind as far as its calendar.

8 THE COURT: I'm not either. I start a three-week  
9 trial on Monday. So it will probably be -- well, either the  
10:03:14 10 last week of April or the first week of May when we find time.  
11 We'll communicate with you to make sure it works with your  
12 calendar.

13 MR. DALIMANTE: Either of those dates work for me.

14 MR. NORTH: That's fine, Your Honor.

10:03:27 15 THE COURT: That all right with plaintiffs' lead  
16 counsel, as well?

17 MR. BOATMAN: It is, Your Honor.

18 THE COURT: Okay.

19 While we're on the subject of motions, there's  
10:03:42 20 another motion to dismiss that was filed by defendant with  
21 respect to the Noterman case on the basis that the plaintiff  
22 was deceased. According to our docket, a response was due  
23 three days ago and we haven't received one. Have defense  
24 counsel seen a response to that motion to dismiss, or have you  
10:04:03 25 talked to the plaintiffs's counsel in that case?

10:04:05 1 MR. NORTH: I have not, Your Honor. I did see some  
2 notice of appearance or substitution of counsel, I believe, in  
3 that case earlier this week, because I believe the clerk's  
4 office issued some sort of deficiency on it, but that's the  
10:04:17 5 only thing I have seen.

6 THE COURT: Have you talked to the plaintiffs'  
7 counsel in --

8 MR. NORTH: I have not.

9 THE COURT: So you have no idea what they're  
10:04:23 10 intending to do?

11 MR. NORTH: No.

12 THE COURT: How about plaintiffs' lead counsel?

13 MR. BOATMAN: Your Honor, we're not familiar with  
14 that case.

10:04:29 15 THE COURT: Okay.

16 Well, it is the motion to dismiss that is at Docket  
17 1072, and the basis for dismissal is that the plaintiff is  
18 deceased. What I'll do is have my staff get ahold of the  
19 plaintiff's counsel and find out if they're going to respond  
10:04:47 20 to the motion, and we will then deal with it.

21 The other pending motions all relate to case  
22 management issues that we're going to be talking about, so  
23 we'll come to those.

24 What I would like to do is start with the FDA warning  
10:05:14 25 letter issue between counsel, because I've just finished this

10:05:19 1 morning reading the materials on that, so it's fresh on my  
2 mind.

3 Let me tell you my initial reaction and give you an  
4 opportunity to respond.

10:05:37 5 The briefs talk past each other a little bit. It's  
6 clear to me that the defendants are of the view that there  
7 should be no additional discovery on the FDA warning letter.  
8 Plaintiffs are of the view there should be substantial  
9 additional discovery. Most of the disagreement appears to be  
10:05:57 10 with respect to the aspect of the warning letter that dealt  
11 with underreporting of events. Although the Recovery Cone  
12 issue is also a part of it.

13 I have attached to the defendants' -- I'm sorry, the  
14 plaintiffs' submission as Exhibit 16, the Rule 30(b)(6) notice  
10:06:19 15 that lists 10 categories of documents to be produced in  
16 connection with the 30(b)(6) deposition, and it appears to me  
17 that many of those were, in fact, produced, although I don't  
18 know that for sure.

19 And I have attached as Exhibit 17, a Request for  
10:06:39 20 Production of Documents from plaintiffs that covers 26  
21 categories of documents, and there's no discussion in the  
22 briefs about the specifics of either the 30(b)(6) list or the  
23 new request for production. There's talk about general  
24 categories, every now and then there's a mention of a  
10:06:59 25 particular category. But I can't go through document request

10:07:05 1 by document request and tell precisely what the parties'  
2 positions are other than the general disagreement that exists.

3 So I'm not sure that I'm going to be able today to  
4 make a ruling on specific document requests. What I'd like to  
10:07:21 5 do is give you an initial reaction and let you respond to it,  
6 and then get your thoughts on how to resolve it. We may need,  
7 once I've given you my initial reaction, to have you confer  
8 again and maybe do a matrix that goes through each of those  
9 document requests so that I can tell precisely what the areas  
10:07:39 10 of disagreement are. We'll talk about that in a minute.

11 Let me tell you my general reaction after having read  
12 the briefs.

13 My general reaction is that the underreporting  
14 portion of the FDA letter is clearly relevant to this case.

10:08:02 15 It seems to me that the rate of failure and the kind of  
16 failure for the Bard products is directly relevant to the  
17 negligence and product defect claims in the case. The  
18 reporting of those failure rates is directly relevant to the  
19 fraud and misrepresentation allegations made in the case.

10:08:28 20 And I don't think the discovery is disproportionate  
21 under Rule 26(b)(1). If you go through the proportionality  
22 factors in that rule, this discovery, in my view, is clearly  
23 concerning important issues at stake in the action. Given the  
24 scope of the MDL, the amount in controversy in this case  
10:08:59 25 doesn't suggest it's disproportionate.



1           The parties' relative access to information is  
2 clearly relevant because the plaintiffs don't have this  
3 information. The importance of this discovery in resolving  
4 the issues, again, I think this is very relevant to almost all  
5 of the plaintiffs' claims in the case. So I can't conclude  
6 that it's disproportionate under Rule 26(b)(1).

7           And so my initial reaction is that the plaintiffs  
8 should be able to conduct discovery into the underreporting  
9 that was noted in the FDA letter, and I didn't find myself  
10 disagreeing with much of what they were suggesting they should  
11 be able to do, although, again, I haven't been able to focus  
12 on specifics because they weren't really discussed.

13           I come to the opposite conclusion on the Recovery  
14 Cone issue. I have difficulty seeing why this is an important  
15 issue in the case.

16           It appears to me that the Recovery Cone has always  
17 been available on the market for retrieval of the filters.  
18 The fact that it didn't have FDA approval doesn't mean it  
19 wasn't there. It was there to be purchased and used.

20           As I understand it, there's no claim in this case  
21 that there was a defect in the Recovery Cone or that the  
22 Recovery Cone was the cause of the plaintiffs' injury. And so  
23 I have -- I have trouble understanding why significant  
24 discovery into the Recovery Cone is relevant. Clearly, it's  
25 publicly known that it wasn't FDA approved, that the FDA

10:10:43 1 thought -- I shouldn't say approved. Permitted. The FDA  
2 thought it should be permitted and has now said it can be  
3 used. If that's a relevant fact, certainly the plaintiffs can  
4 propose to present that at trial.

10:10:56 5 But I have trouble understanding why discovery in  
6 this issue really bears on any of the claims in the case.

7 So with those general observations, what I'd like to  
8 do is give you an opportunity to address my general  
9 conclusions and help me understand what I might not be  
10:11:11 10 understanding about your positions. And then we can talk  
11 about, in light of my view on those issues, how we resolve  
12 specifics in the discovery disputes.

13 So why don't we let the plaintiffs go first with any  
14 thoughts on these issues.

10:11:37 15 MR. BOATMAN: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. BOATMAN: I think I agree with you. As you  
18 noted, we think probably the underreporting is, if not the  
19 most important evidence in the case, one of the most important  
10:11:49 20 issues and evidence in the case, and it sounds like you're in  
21 agreement so I'm not going to address all of the reasons why  
22 it is so important.

23 On the Recovery Cone, I think you're also right, it's  
24 much less significant. I think the only point that we want to  
10:12:07 25 make out of that is that it sort of reflects upon the rush to

10:12:11 1 the market by Bard, their willingness to cut corners and do  
2 anything to get it to the market, including failing to submit  
3 it through the 510(k) process like the other manufacturers  
4 did.

10:12:26 5 So it's really a culture of noncompliance, the rush  
6 to market, and cutting corners. I don't think we need a lot  
7 of discovery on that. I think we have Mary Edwards scheduled.  
8 She's the one that has a one-sentence memo in the file that  
9 says, We decided we don't need to submit this. And the little  
10:12:46 10 bit of discovery we need on the Recovery Cone, I think we can  
11 probably cover in her deposition.

12 THE COURT: Okay. Thanks, Mr. Boatman.

13 Mr. North, do you agree to the deposition of  
14 Mary Edwards?

10:13:10 15 MR. NORTH: Yes, we agreed to that last time,  
16 Your Honor, specifically as a follow up on the Kay Fuller  
17 allegations, but obviously it's no problem if they ask  
18 questions about the Recovery Cone at that deposition.

19 THE COURT: Okay.

10:13:24 20 MR. NORTH: Your Honor, with regard to the  
21 underreporting of events, we certainly understand the Court's  
22 comments. It's a sort of difficult issue for us because when  
23 we analyze it and know and talk to our people, we really don't  
24 think this is the issue they think it is, but we understand  
10:13:38 25 that in a briefing situation and at this stage of the

10:13:42 1 litigation, it's more of a he said, she said.

2 So we understand that it's hard to make the point  
3 it -- that it's just not relevant, as we think it will prove  
4 to be at the end of the line.

10:13:54 5 So I think the real concern here is not so much given  
6 our recognition that there's got to be some discovery, it's  
7 the breadth of discovery they're asking for. It's the fact  
8 that they've already deposed the single most knowledgeable  
9 person who spearheaded all of the work, all of the responses  
10:14:12 10 to the FDA warning letter, all of the retrospective reviews of  
11 complaint files. And they've already deposed him for ten  
12 hours. And now they're wanting to depose the people that  
13 report to him, that he supervised in doing that. They want to  
14 depose the person who he reports to, who had much more  
10:14:29 15 peripheral involvement in events than he did.

16 He has testified without equivocation, Mr. Modra,  
17 that he was the point person for the companies in both the  
18 initial inspections by the FDA, all the responses over the  
19 months, the FDA warning letter. He drafted the letters that  
10:14:50 20 went back to the FDA. Although signed by the presidents of  
21 the company, he drafted the response letters. He's been  
22 deposed.

23 Does that mean they shouldn't be able to depose  
24 anybody else? We're not saying that, Your Honor, but we do  
10:15:06 25 believe it is somewhat overkill what they're proposing to do,

10:15:09 1 to depose three people that report to him that he supervised,  
2 to depose his direct report, even though her involvement was  
3 much more peripheral.

4 And the document requests are another issue that we  
10:15:22 5 have problems with because it essentially asks for every  
6 single e-mail communication in the entire company that may  
7 have referenced the FDA inspection.

8 It seems to me that where we ought to go from here  
9 is, with the Court's guidance, maybe Mr. Boatman and I can get  
10:15:39 10 together and see if we can go through those requests  
11 specifically and submit something to the Court in the next few  
12 days or a week or so in a matrix form, as the Court indicated.

13 THE COURT: All right. Let me -- let me ask you  
14 another question, Mr. North. You mentioned the depositions.  
10:15:58 15 One of the things I understand the plaintiffs want to do is to  
16 go back in time beyond the two-year examination that the  
17 company did to look at whether there was underreporting of the  
18 kind that was discovered during that two-year period.

19 That seems relevant to me. It seems relevant to me  
10:16:20 20 because if, in fact, the company was underreporting before  
21 2013, again, I think that bears on their claims of negligence  
22 and product defect, and it bears on their claims of  
23 misrepresentation.

24 What is your reaction to that kind of discovery? And  
10:16:42 25 I'm not saying this to discourage you from disagreeing with

10:16:46 1 me. If I'm wrong in your view, I want to know why so that I  
2 make the correct decision. So don't feel you need to be  
3 deferential, but it just really appears quite relevant to me  
4 in the case, and I want to make sure I understand your view if  
10:16:58 5 you think it's not.

6 MR. NORTH: Well, in that particular issue,  
7 Your Honor, I'm not certain I understand what they want from  
8 us. We have already produced all of the complaint files for  
9 all of the filters except the Simon Nitinol filter. They have  
10:17:14 10 all those complaint files effective through December of 2015.

11 So they have that data. We produced to them all of  
12 the information about the retrospective reviews that were done  
13 over the previous two-year periods. I mean, are they asking  
14 us to go now and affirmatively conduct an additional  
10:17:33 15 retrospective review beyond those two years? If we haven't  
16 done it, I'm just not sure what they're expecting us to  
17 produce, other than the underlying data, which we've already  
18 given to them.

19 THE COURT: All right. Okay.

10:17:48 20 MR. NORTH: Thank you, Your Honor.

21 THE COURT: Mr. Boatman, can you address that?

22 MR. BOATMAN: Yes, Your Honor.

23 On that narrow point, if, in fact, they have produced  
24 everything that we're seeking, it shouldn't be very difficult  
10:18:04 25 for them to say here's our production because it's complete.

10:18:09 1 I have to confess I don't know all of the details of  
2 everything that's been produced as far as TrackWise and  
3 complaint files. We have a committee that is putting together  
4 our own database and trying to track that. If it is, in fact,  
10:18:26 5 true they've produced everything, then there is no burden upon  
6 them, of course.

7 We think that's not the case. We think that there is  
8 additional documents we need about what's really gone on, the  
9 policies that led to the 500 percent failure-to-report rate in  
10:18:44 10 the two years audited, and we want to go back and take a good,  
11 hard look at that.

12 And I agree that with the benefit of the people that  
13 have been studying that issue, working with me and sitting  
14 with Mr. North, we may be able to narrow, to determine if, in  
10:19:04 15 fact, they've produced some or all of what we need.

16 But, you know, as just one example, they're objecting  
17 to producing the communications concerning the warning letter.  
18 All they gave us, Your Honor, was what has been cleansed and  
19 approved and written with the assistance of counsel that was  
10:19:26 20 sent to the FDA and what the FDA sent back. So we have a --  
21 really the tip of the iceberg. We have what -- how they want  
22 to present it as approved by counsel.

23 We'd like to see what's really going on. What was  
24 going on internally to determine how did we get to the point  
10:19:45 25 that we're failing to report literally hundreds, and if you

10:19:49 1 project it over the full term of the filters, thousands of  
2 injuries and deaths as simple malfunctions.

3 And so the idea that they, for example, produced the  
4 documents to the FDA, that is something we could have gotten,  
10:20:06 5 I presume, through the Freedom of Information Act. They have  
6 to date withheld anything about what they have done  
7 internally, what they've been -- the thought processes they  
8 went through, the memorandum is this appropriate or is this  
9 not appropriate, how they came up with their policies and  
10:20:23 10 procedures.

11 So we think we need substantial discovery on how --  
12 what we've now found out they did as far as underreporting  
13 came about and was it intentional? Was it part of a fraud to  
14 make their devices look safer than they really were? Was it  
10:20:45 15 simple negligence? And if it was negligence, who made these  
16 mistakes? Who -- how did this slip through the cracks?

17 THE COURT: A question on this issue, Mr. Boatman.

18 In your brief, you indicate that you want complaint  
19 files from 1998 to the present. Not in your complaint, but in  
10:21:20 20 your document production request.

21 When you shift to other categories such as training  
22 materials, you ask for 2003 to the present.

23 Same thing with annual internal audits. The quality  
24 systems, 2003 to the present. And other categories.

10:21:52 25 Two questions. One is, what, as far as you know, is



10:21:55 1 the earliest date in this MDL where a product was implanted?

2 MR. BOATMAN: 2003, Your Honor.

3 THE COURT: Okay. If that's true, why do you need  
4 information going back to 1998?

10:22:17 5 MR. BOATMAN: I think we probably don't. I think  
6 2003 is when the retrievable filters were put on the market.  
7 I think, if I had to guess, it was to -- designed to capture  
8 the SNF data that preceded the Recovery filters.

9 THE COURT: Mr. Lopez wants to add a thought here.

10:22:41 10 MR. LOPEZ: I might be able to help. There was  
11 actual clinical trial work commencing in about the '98, '99  
12 period. We know at least one clinical trial that was  
13 happening in Canada. We don't know whether there were others.  
14 I know this device is sold all over the world. So we were  
10:22:53 15 hoping to catch the clinical trial. We know there was some  
16 adverse consequences in clinical trials. We have a 1999, for  
17 example, clinical trial report of a migration.

18 So we just want to make sure -- they're supposed to  
19 report those. So we want to make sure if there are complaint  
10:23:11 20 files that go back to when they are doing premarketing, when  
21 they're doing clinicals, that we're getting those complaint  
22 file, as well.

23 THE COURT: Well, Mr. Lopez, it sounds as though  
24 you're characterizing an incident in a clinical trial as a  
10:23:26 25 complaint file. Is that true?

10:23:29 1 MR. LOPEZ: Yeah. I mean, if there is an adverse  
2 event, even if it's in a clinical trial, it's a reportable  
3 event. And certainly, even if it's not a reportable event,  
4 it's still notice to the company that they knew early on that  
10:23:43 5 they had some problems with the design of their product that  
6 they launched however many years later.

7 They started the process of trying to get this device  
8 on the market in about 1997. I have a document showing 1997.

9 THE COURT: Help me understand what you would do at  
10:24:04 10 trial with an event in 1998 that wasn't reported or was  
11 underreported. How does that become relevant to the cases in  
12 this MDL?

13 MR. LOPEZ: Well, there's two things. I mean,  
14 obviously the FDA cleared this device based on representations  
10:24:26 15 of it being as safe and effective as a predicate device, which  
16 is the Simon Nitinol filter, which we'll be talking about  
17 later.

18 If there's evidence that in clinical trial subjects  
19 it was breaking and migrating and tilting and perforating,  
10:24:41 20 then we have just preliminarily FDA not -- maybe not having  
21 that information and therefore not clearing it, number one.

22 Number two is that the company would have notice of  
23 design defects -- it's a different design than the  
24 predicate -- prior to it even being introduced into the  
10:25:01 25 commercial market in the United States, of fracture, however

10:25:06 1 number of complications, and not making design changes to fix  
2 that. We know some instances where that happened. We  
3 don't -- we don't know the full scope of it.

4 For example, we have in a report the description of a  
10:25:20 5 migration in a clinical trial, but we don't have the medical  
6 records, we don't have the background information. We don't  
7 have the investigation, the complaint file, what was reported,  
8 how it was reported to FDA or any other authority. It was  
9 done in Canada, so it may have been reported to the Canadian  
10:25:37 10 authorities.

11 THE COURT: Well, do you disagree with Mr. North's  
12 assertion that the defendants have turned over all of the  
13 complaint files?

14 MR. LOPEZ: Yes.

10:25:50 15 THE COURT: Explain why.

16 MR. LOPEZ: Because we don't have complaint files for  
17 a lot of their clinical trials, their clinical trial subjects.

18 THE COURT: Okay. Other than the clinical trial  
19 subjects, do you agree that the defendants have turned over  
10:26:02 20 all of the complaint files?

21 MR. LOPEZ: I'm probably not the best person -- I  
22 know there's been a supplemental production of their TrackWise  
23 complaint files. Maybe one of my colleagues could address  
24 that. I don't want to answer that if I don't know the answer.

10:26:17 25 THE COURT: All right. That's fine.

10:26:18 1 Were you going to say anything else, Mr. Boatman?

2 MR. BOATMAN: No, Your Honor. I thought you had two  
3 questions.

4 THE COURT: Yeah. The second question was the  
10:26:23 5 relevancy that was just addressed.

6 Thanks.

7 Mr. North.

8 MR. NORTH: Couple of things, Your Honor.

9 I should have noted this when I first stood up.

10:26:35 10 Mr. Stoller on behalf of the plaintiffs and my colleague  
11 Mr. Lerner have been talking a lot in the past about these  
12 requests for production, and by agreement we are responding to  
13 a large number of those. In fact, in a pleading that will go  
14 out today in a production that's going out today.

10:26:49 15 So some of the things the Court's mentioning, like  
16 quality, policies, audits, and things like that, to the extent  
17 we have those, are being produced, which I think would  
18 respectfully suggest makes it imperative that once they see  
19 that production after today, Mr. Boatman and I sit down and  
10:27:04 20 see if we can't really hone in on what's remaining that they  
21 want in that regard.

22 With regard to the complaint files, Your Honor, with  
23 the exception of Simon Nitinol complaints, we have produced  
24 all that Bard has. We have confirmed that through December of  
10:27:25 25 2015.

10:27:26 1 Whether those include something from a clinical trial  
2 in '98 or '99, which was three years before we even bought the  
3 Recovery filter, I'm not sure. But we've produced -- we have  
4 confirmed over and over again, we've produced all they have.

10:27:43 5 Lastly, Your Honor, if I could just for the record,  
6 and I know this is now not the time to make this argument, but  
7 we're all talking in terms of underreporting, and I understand  
8 that's the argument that the plaintiff makes.

9 But I just want the record to be clear, and I think  
10:27:57 10 the evidence will show this as it develops, that the FDA's  
11 issues were not with underreporting. The only complaints they  
12 alleged that we failed to report had to do with deployment,  
13 failed deployment where there was no real injury.

14 All of the other complaints they had concerned how we  
10:28:15 15 characterized it. Not whether we submitted the report to the  
16 FDA in the first place. And again, I don't think that affects  
17 the calculus of what we're doing here, but I think it's an  
18 important distinction for this litigation going forward.

19 THE COURT: Well, since you raised it, let me ask you  
10:28:31 20 a couple of questions on that. What about the 44 that were  
21 found in the retrospective that weren't -- as I understood it,  
22 weren't reported?

23 MR. NORTH: 44.

24 THE COURT: Yeah. There were 230 that I think the  
10:28:44 25 conclusion was they were reported as a malfunction, and you

1 reclassified them as a serious injury or a death, and there  
2 were 44 that weren't even reported as a malfunction that you  
3 concluded should have been reported. Maybe I misread the  
4 briefs.

10:28:59 5 MR. NORTH: My understanding, Your Honor, is the FDA  
6 warning letter cited about four or five deployment related  
7 complaints that were not actually reported to the FDA.  
8 Instances where there was a difficulty in deploying the  
9 device, but no real injury.

10:29:14 10 And then in our retrospective review, I believe we  
11 found 44 that fit that similar criteria, where it was a  
12 deployment difficulty, but no injury, and under what we  
13 understood at the time the FDA to be saying, we should have  
14 reported those as a malfunction, and we did not.

10:29:35 15 THE COURT: By a deployment difficulty, are you  
16 meaning they tried to put it in and they couldn't?

17 MR. NORTH: Right. You know, it's released from a  
18 catheter, Your Honor, the actual filter is released from a  
19 catheter into the IVC, and there was some difficulty in the  
10:29:51 20 release.

21 Now, since -- as Mr. Moder testified, since that time  
22 there had been informal meetings with the FDA, and that's now  
23 been documented in e-mails between the agency and the company,  
24 where we had overreacted in our retrospective review of even  
10:30:09 25 those failure-to-deploy cases. And the FDA has said your real

10:30:13 1 problem was you didn't explain your rationale in the complaint  
2 file as opposed to whether you should have reported or not.

3 But I think it's important that those are the only  
4 category of complaints that the FDA said we failed to report  
10:30:28 5 in the initial warning letter or later, and that only dealt  
6 with no injury failure to deploy.

7 THE COURT: Okay. The second question. If Bard  
8 reports an event and calls it a malfunction rather than a  
9 serious injury, my understanding is that's a matter of  
10:30:47 10 checking a box or marking a field, does the MAUDE --  
11 M-A-U-D-E, all in caps -- does the MAUDE database then report  
12 to the world that as a malfunction rather than as a serious  
13 injury?

14 MR. NORTH: Your Honor, I must be frank, I don't  
10:31:05 15 think -- I'm not positive of this, but I don't think you can  
16 go on the MAUDE database and search based on that  
17 characterization. I could be mistaken, but I've never heard  
18 that you can do that.

19 Now, in the body of the complaint discussion on the  
10:31:18 20 database, it will say what the injury or event was. So it's  
21 just a matter of characterization. I don't believe that it  
22 really affects any interpretation.

23 THE COURT: Okay. Thank you. I know the plaintiffs  
24 disagree on that.

10:31:33 25 MR. LOPEZ: That's wrong, Your Honor. I mean, if

10:31:35 1 there's a category in MAUDE for malfunction, there's a  
2 category for serious injury.

3 THE COURT: I saw your footnote on that. I didn't  
4 have time to go to the website you cited, but I understand  
10:31:46 5 there's a disagreement on that.

6 Well, I think what we ought to do is this, I think we  
7 should have you meet and confer, and where you disagree on  
8 the -- what I call the underreporting issue, discovery, create  
9 a matrix for me. The plaintiffs' precise discovery request,  
10:32:09 10 the defendants' precise response, why the plaintiff thinks  
11 it's appropriate, why the defendant thinks it's inappropriate.  
12 That will ensure that everybody is talking about the same  
13 issues.

14 I will go through the matrix and issue rulings. If I  
10:32:23 15 need to get you on the phone to clarify things, I'll do that.

16 My view with respect to the depositions is that the  
17 three or four employees under Mr. Modra that have been  
18 identified should be deposed. I think that's appropriate  
19 given what I view as the central nature of this issue.

10:32:41 20 I don't know about the fellow he reports to or  
21 others. If you have a disagreement on that, put it in the  
22 matrix and I will be happy to look at those.

23 What I would suggest is that -- well, why don't you  
24 give me your thoughts on how long you think it will take to  
10:33:12 25 meet and confer and work this out and put together a matrix.



10:33:19 1 MR. BOATMAN: Your Honor, we need to get going on our  
2 discovery, so I would hope we could do it in -- by a week from  
3 Monday.

4 MR. NORTH: I think that's reasonable, Your Honor.  
10:33:33 5 Like I said, they will be getting the discovery responses,  
6 those will be served today, and I think that will give the  
7 background to have this meet and confer.

8 THE COURT: All right. I will tell you that I'm in  
9 trial the entire week of the 11th, so even if you get it in on  
10:34:02 10 Monday, I won't be able to look at it. It's a particularly  
11 difficult trial that's going to absorb all available time.

12 Why don't we have you submit it by the 15th just to  
13 make sure you've got enough time. My trial should end the  
14 following week, and hopefully I'll be able to then look at the  
10:34:18 15 matrix.

16 And by the way, my view is that the issue we're  
17 dealing with is the underreporting issue. It sounds as though  
18 the Recovery Cone issue will be addressed through the  
19 deposition of Ms. Edwards, and I think that is appropriate,  
10:34:57 20 but I don't think its relevancy justifies further discovery.

21 Okay. Let's talk next about the Simon Nitinol issue.

22 I've looked at the matrix you all have presented.

23 I think I'd like to start with some questions of  
24 defense counsel, whoever is going to be addressing this.

10:36:31 25 Is it you, Mr. North?

10:36:33 1 MR. NORTH: Yes.

2 THE COURT: Actually, let me start with the  
3 plaintiffs, Mr. North.

4 MR. NORTH: Okay.

10:36:49 5 THE COURT: Mr. Lopez, give me three minutes of the  
6 closing argument you will be making to a jury where you're  
7 talking about the Simon Nitinol filter.

8 MR. LOPEZ: Only just three minutes.

9 THE COURT: I'm looking for a summary, but, again, I  
10 think I understand your relevancy arguments, but I want to  
11 make sure I do. And so what I want to understand is how does  
12 this play out in front of the jury. What are the points  
13 you're going to be making to the jury about Simon Nitinol?

14 MR. LOPEZ: Your Honor, I actually have some  
15 documents that -- about ten documents that span a period of  
16 about ten years, and two or three excerpts from depositions  
17 that I was going to show to the Court. Now, obviously it will  
18 take me longer than three minutes to do that. But -- I think  
19 the first thing we have to do is dispel you of the notion that  
20 this is a marginally relevant issue.

21 It's my turn to say, as Mr. Boatman said, this is the  
22 most important evidence in the case. Because I think it is  
23 and always have thought it was. But I'll do what you've asked  
24 me to do first, but I really want an opportunity --

10:38:04 25 THE COURT: If you'd rather do it another way, feel

10:38:05 1 free. I just want to understand your view of why it's highly  
2 relevant. I think I understand it from the brief and the  
3 matrix, but I don't know this case well enough to be confident  
4 I've got it right, and that's why I want to hear your  
10:38:18 5 description.

6 MR. LOPEZ: Thank you. I will do that now, but I  
7 just want the Court to know I actually have evidence and  
8 documents, and it's not counsel, plaintiffs' counsel's  
9 argument. These are actually documents and testimony of the  
10:38:32 10 defendant that I think will show the significant relevance of  
11 the Simon Nitinol filter.

12 Every device that is the subject of this case, the  
13 safety and effectiveness of that device, it all goes back to  
14 the Simon Nitinol filter. I mean, none of these devices get  
10:38:51 15 on the market unless the company establishes through some  
16 means to FDA, through bench testing and other testing, that  
17 the Recovery filter, the G2 or the G2X, the Eclipse, the  
18 Meridian, the Denali are all as safe and effective as the  
19 Simon Nitinol filter that had been on the market for ten  
10:39:12 20 years.

21 And they represent, by the way, not only to FDA, but  
22 they represent afterwards and to doctors -- well, before I get  
23 to that, clinically that proved not to be true. In other  
24 words, they knew within months of all of those devices being  
10:39:29 25 on the market that when you compared the risk, the

10:39:33 1 complications, the serious injuries to the devices they were  
2 selling, we're nowhere near the Simon Nitinol filter. Well,  
3 under the regulations and based on testimony that we've  
4 already seen from some experts in this case, including some of  
10:39:47 5 the defense experts in prior cases and including some of their  
6 internal clinical affairs directors and things like that, you  
7 are now selling an adulterated and misbranded product because  
8 you're no longer selling -- I mean, a substantially equivalent  
9 safe and effective device, and therefore you should remove it  
10:40:06 10 from the market.

11 In addition, in one of the documents I have, the  
12 official messaging that they give to their sales force, the  
13 official Q and A or frequently asked questions that they know  
14 they're going to get hit with as these things are starting to  
10:40:22 15 reveal themselves in the open market, is the answer is we are  
16 as good as or better than our Simon Nitinol filter. In fact,  
17 their sales brochures, which are two of the documents I have,  
18 say that.

19 In reality, the internal documents show that -- I'll  
10:40:39 20 just give you an example. The Simon Nitinol filter, in ten  
21 years, had two fractures in 50,000 units. In the first year,  
22 the first six months that the Recovery filter was on the  
23 market, it had 17 fractures in the first 10,000 units. The  
24 Recovery filter had no migratory deaths, meaning where the  
10:41:01 25 device actually left the vena cava and went into the heart.

10:41:03 1 None.

2 THE COURT: Recovery?

3 MR. LOPEZ: No. The Simon Nitinol filter had no  
4 deaths from migration. In the first year that the Recovery  
10:41:10 5 was on the market, it had nine deaths of the Recovery filter  
6 migrating into people's hearts because it was not staying  
7 where it was supposed to stay. The device is supposed to stay  
8 where you put it and it's not supposed to break, it's not  
9 supposed to perforate, it's not supposed to tilt.

10:41:26 10 And the Simon Nitinol filter did not have those  
11 problems of any real significance over a period of nine years.  
12 In the first nine months the Recovery filter's on the market,  
13 it is breaking, it's moving, and it's literally resulting in  
14 people's deaths.

10:41:39 15 The G2, in the first few months it's on the market,  
16 had fractures that exceeded the entire history of the  
17 Simon Nitinol filter.

18 One of the documents I have, and if we get to that  
19 today, I know as counsel mentioned that the predicate device  
10:41:54 20 is the Simon Nitinol -- I mean is the Recovery filter for the  
21 G2. Well, I have a document that shows that that is not true.  
22 They actually are comparing the G2 to the Simon Nitinol filter  
23 and saying that we must be substantially equivalent or as safe  
24 as and as good as the Simon Nitinol filter.

10:42:12 25 So this notion that you can -- you have -- create a

10:42:15 1 bad device after the Simon Nitinol filter and that becomes a  
2 new measure of safety is ludicrous. I mean, every expert will  
3 tell you that once you start with the Simon Nitinol filter as  
4 the predicate device, the entire line of devices that get  
10:42:30 5 cleared after that all have to revert back to the  
6 Simon Nitinol filter as a minimum standard of safety and  
7 effectiveness.

8 So that's -- I know it's longer than three minutes,  
9 but there's a lot to say about that. Like I said, I have a  
10:42:48 10 ten-year history of documents here where the company is doing  
11 those internal comparisons.

12 THE COURT: I understand what you've said. What are  
13 you going to say to the jury? Are you going to say what you  
14 just said? Let's say you're talking about, you know, an  
10:42:57 15 injury from the G2 filter.

16 MR. LOPEZ: Two things. I mean, two or three things.  
17 Number one is the minimum standard of safety and effectiveness  
18 for this device is the Simon Nitinol filter. They represented  
19 to the world this device was actually better. Was actually  
10:43:12 20 safer and more effective.

21 Internally, in doing their own analysis, they did  
22 their own analysis in comparing the Simon Nitinol filter to  
23 the Recovery filter to the G2 to the Eclipse and so on, and  
24 they knew it wasn't. Yet their official messaging to the  
10:43:29 25 company -- I mean to the world, was false and misleading.

10:43:32 1 Their own -- one of the experts in this case from a year or so  
2 ago is no longer an expert because she agreed at her  
3 deposition that their sales brochure and their sales material,  
4 based on the comparisons that were done to the Simon Nitinol  
10:43:45 5 filter and all the other devices, was false and misleading.  
6 And if false and misleading, you are selling a device that you  
7 shouldn't be selling. You should be taking it off the market.  
8 You are selling a misbranded and adulterated product.

9 I mean, it -- to put it in a nutshell, their  
10:44:03 10 representations, not just in their testing to FDA, I mean we  
11 know that that was false when they represented it was  
12 equivalent, I've got those test results here that show all of  
13 their devices were substantially lower than -- even in bench  
14 testing and animal testing to the Simon Nitinol filter. But  
10:44:20 15 in the real clinical world, I know the Lehmann report's not in  
16 this case, but the Lehmann report is filled with the  
17 comparisons to the Simon Nitinol filter and the substantial  
18 statistically significant differences, and every single risk  
19 between the Simon Nitinol filter, the Recovery -- it wasn't  
10:44:41 20 the G2 then, it was the Recovery -- but consistently  
21 throughout the course of all of these devices are all these  
22 comparisons to the Simon Nitinol filter because they know  
23 that's the minimum safety and effectiveness standard.

24 THE COURT: All right. So here's my question. I  
10:45:00 25 understand that you're going to be arguing that the later

10:45:04 1 removable filters were not as good as the Simon Nitinol, even  
2 though it was the original predicate device and even though  
3 you will assert the defendants themselves were saying publicly  
4 it's as good as the Simon Nitinol. Sounds like you're going  
10:45:20 5 to hold Simon Nitinol up as a good product that was safe and  
6 all these others were bad in comparison and the company was  
7 defrauding the public when it said otherwise.

8 Assuming that's all true, why do you need, then,  
9 discovery into the testing and the development of the  
10:45:39 10 Simon Nitinol? You've already got that as your standard.  
11 What is it -- you want to make it better? What is it you hope  
12 to do with these various categories of discovery you want to  
13 undertake?

14 MR. LOPEZ: Well, Your Honor, let me give you two  
10:45:53 15 examples. Two of the documents I have. One is from their  
16 director of clinical affairs and medical director, and I think  
17 we quoted it in our matrix. It says, Why are we using the G2  
18 when have the Simon Nitinol filter that's safer, that has no  
19 complications? These are both permanent devices. Why in the  
10:46:11 20 world are we selling the G2 that's -- it's already showing  
21 that it's got all these complications.

22 Dr. Ciavarella testified at his deposition that he  
23 assumed the people he wrote that to would have answered that  
24 e-mail and that they would have gathered the information he  
10:46:27 25 requested. We don't have any of that.



10:46:30 1 In other words, we don't have the chain of events  
2 that would have -- that occurred after the director, vice  
3 president of clinical affairs, says, Why are we using the G2  
4 when we have a safer device, the Simon Nitinol filter, and he  
10:46:45 5 asks for comparative data to compare the Simon Nitinol filter  
6 to the G2. That's where it stops.

7 And I assume that the people he sent that to are the  
8 people -- you know, when you get a letter or e-mail like that  
9 from the only medical person in the whole company, that there  
10:47:04 10 might have been a meeting about that, there might be meeting  
11 minutes, there might be a lot of e-mails that have gone up and  
12 down the chain. All's I know is they have not done a thorough  
13 production that we can see.

14 There's another area where a sales representative,  
10:47:20 15 actually he's a district manager, in 2006 asks the same  
16 questions. He says, you know, Why are we -- we should be  
17 selling the Simon Nitinol filter. It's the filter that has no  
18 complications. We have nothing but problems with the G2.

19 THE COURT: So what you're arguing, I think,  
10:47:36 20 Mr. Lopez, is it's very relevant for you to have documents  
21 from within Bard saying Simon Nitinol's better.

22 Why, though, why are you after design documents for  
23 the Simon Nitinol? Why are you after testing? If you already  
24 think that's the better product, why do you want to dig into  
10:47:54 25 its history and how it was designed and tested?

10:47:57 1 MR. LOPEZ: You know, I agree with you -- I would  
2 sacrifice all of that for their marketing materials. I want  
3 to see how this company, when they knew they had a product  
4 that was safer than every other product they were marketing  
10:48:09 5 for the same indication was representing in another -- in  
6 their G2 and Recovery and other devices, that that device was  
7 better than every other device it ever made before, what are  
8 they saying about the Simon Nitinol filter to the world in  
9 their marketing? What are they saying internally in their  
10:48:29 10 marketing meetings when they're asked those same -- when  
11 doctors are asking the same, you know, why are you selling me  
12 the G2 as a permanent device when you have the Simon Nitinol  
13 filter? What are your comparisons and your safety and  
14 effectiveness between those two.

10:48:54 15 VOICE ON PHONE: I wasn't sure if you were listening  
16 in or not.

17 MR. LOPEZ: And we've seen some of that, Judge, where  
18 the official position of the company is tell the world that  
19 we're as good or better than the Simon Nitinol filter. I want  
10:49:01 20 to know how they're -- what kind of discussions they're  
21 having, how they come to that conclusion.

22 (Voice on phone indistinct talking.)

23 MR. LOPEZ: Marketing meetings, brochures, things  
24 like that. We have no marketing materials for the Simon  
10:49:11 25 Nitinol filter.

10:49:13 1 THE COURT: Okay. I understand that. Thanks.

2 Counsel on the phone, we have somebody on the phone,  
3 a woman's voice, talking that we can hear, and it's kind of  
4 interfering with what we're saying. So if you all could mute  
10:49:26 5 your phones or just not talk, we'd appreciate it.

6 Mr. North, you want to make your opposing jury  
7 argument, probably?

8 MR. NORTH: I'm sorry, what's that, Your Honor?

9 THE COURT: You want to make your opposing jury  
10 argument? You don't have to, but give me your response to  
11 what Mr. Lopez said.

12 MR. NORTH: Your Honor, this is not a situation where  
13 we're taking an all-or-nothing stand. We recognize that there  
14 is some relevance to the Simon Nitinol filter. We recognize  
10:49:54 15 that they are entitled to some documents.

16 What we're saying is they have a wealth of documents  
17 already. They've asked for the design materials. We've given  
18 them the design history file and the fact books. They've  
19 asked for the testing. We've given them those two large sets  
10:50:14 20 of documents with the testing materials and the 510(k)  
21 submission, which has all of the testing and summaries of the  
22 testing in it.

23 We've given them most all, we think, of the  
24 regulatory submissions over the years regarding the  
10:50:28 25 Simon Nitinol filter, and we have agreed to go back and see if

10:50:31 1 there's anything that we have that we haven't given them so  
2 that they have the entire history.

3 Mr. Lopez mentions marketing materials. We're  
4 happy -- and I think we already have given them some  
10:50:43 5 representative materials. We're happy to give them  
6 representative materials, but their request as phrased would  
7 essentially ask us to give every shred of paper we can find,  
8 looking wherever, whenever, however over a 25-year period that  
9 that product's been on the market, and we think that that is  
10:51:02 10 overly burdensome given what we think is the marginal  
11 relevance of the Simon Nitinol filter.

12 They've asked for comparative materials in very broad  
13 strokes that would basically ask for every communication or  
14 internal mention of the Simon Nitinol filter. We have given  
10:51:23 15 them hundreds and hundreds of pages of internal calculations,  
16 computations, comparing the complication rates, reported  
17 complication rates of each of our filters with a Simon Nitinol  
18 filter, as well as with competitive filters.

19 We put in our submission in the matrix the numerous  
10:51:41 20 Bates numbers for all of those they've been given.

21 And then their last request, number 6, asks for all  
22 internal communications regarding the Simon Nitinol filter.  
23 All.

24 No limitations as to custodians. No limitations as  
10:51:55 25 to time frame. No limitations as to the division.

10:51:59 1 It overlooks the fact that SNF, the acronym, in  
2 Simon Nitinol were previously used as search terms in the ESI  
3 searches that were conducted. It overlooks the fact that the  
4 same team of people involved with the retrievable filters also  
10:52:15 5 had functional responsibility for the Simon Nitinol filter  
6 over the years.

7 To respond to that request would require us  
8 essentially to sweep the electronically stored information of  
9 hundreds of employees over a 25-year period.

10:52:31 10 So that's where our objection is. Not that there is  
11 no relevance at all to the Simon Nitinol filter, but what  
12 they're asking for is simply far beyond what the relevance is.  
13 And in that point I would -- or in that regard I would point  
14 out, Your Honor, yes, the Simon Nitinol filter was identified  
10:52:49 15 to the FDA as the predicate device for the Recovery filter,  
16 and only the Recovery filter.

17 Now, predicate device is a term of art. The FDA does  
18 not require the predicate device to be identical in technical  
19 function. And in this instance, there are very different uses  
10:53:08 20 of these filters, as the Court alluded to. The Simon Nitinol  
21 is strictly a permanent filter. Once implanted, there's no  
22 way to get it out except extraordinarily invasive surgery.

23 The Recovery filter and all later generations of the  
24 filters are retrievable, so they necessarily have different  
10:53:30 25 design characteristics. So while there may be some relevance

10:53:33 1 in the fact that the Simon Nitinol was the predicate filter, a  
2 lot of this is apples and oranges in the comparisons.

3 And, Your Honor, I'm not sure if this thing works  
4 here or --

10:53:43 5 THE COURTROOM DEPUTY: It does.

6 MR. NORTH: Your Honor, these are some statistics of  
7 the case count, and of course this is changing daily,  
8 particularly since there seems to be a rush to get cases on  
9 file prior to April 1, but this is the case count through  
10:54:06 10 Tuesday, March 29th. At that point there were 336 cases in  
11 the MDL, according to our records. Only one of those cases,  
12 and that was only filed in the last ten days, has to do with  
13 the Simon Nitinol filter.

14 Only 39, just a little over 10 percent of the cases,  
10:54:27 15 have to do with the Recovery filter, which is the only filter  
16 that Bard represented to the FDA had the Simon Nitinol as the  
17 predicate filter.

18 This litigation, and the center of gravity of this  
19 litigation, is clearly moving towards the G2 and the Eclipse  
10:54:47 20 and even the Meridian. And we would submit that the amount of  
21 documentation we have produced, which is extensive regarding  
22 the Simon Nitinol filter, is more than ample for the purposes  
23 given the relevance in this litigation.

24 THE COURT: Mr. North, my understanding from the  
10:55:06 25 briefs is that the way you have found the Simon Nitinol

10:55:18 1 communications that you've produced has been through ESI  
2 searches of custodians that were identified for other filters.

3 MR. NORTH: Right.

4 THE COURT: You've said a moment ago that the same  
10:55:35 5 people responsible for the retrievable filters are responsible  
6 for the Simon Nitinol. Are you saying there's 100 percent  
7 overlap? That there's nobody in the company responsible for  
8 Simon Nitinol that is not also responsible for the retrieval  
9 filters?

10:55:51 10 MR. NORTH: That is my understanding, Your Honor. In  
11 that regard, keep in mind there's very little activity with  
12 the Simon Nitinol. It's part of the product line and it's out  
13 there, but as we pointed out in it the matrix, the last 510(k)  
14 regarding this device -- and you go on the FDA website and  
10:56:07 15 see -- was in the late '90s. Long before we bought the rights  
16 to the device in 2001.

17 There has been no design development work on the  
18 device since we bought it. There was a design verification  
19 which resulted in the design history file when we first  
10:56:23 20 acquired the product. That's been produced to the plaintiffs.

21 So there really has not been any development design  
22 work on this device over the years. There's been marketing,  
23 and the same person who is the marketing manager for this  
24 device is the marketing manager for the others. His or her  
10:56:40 25 title over the years has been marketing director for filters.

10:56:43 1 All filters. It's just part of the product line. There have  
2 been no separate employees involved, and there really was no  
3 work at the company other than comparisons with the other  
4 filters, which we produced to them.

10:56:59 5 THE COURT: All right. Thank you.

6 Mr. Lopez.

7 MR. LOPEZ: Yes, Your Honor.

8 I meant to do this originally. We're going to hear,  
9 and I think we've seen in a lot of the briefings and certainly  
10:57:13 10 when we have these hearings about how Bard had this nebulous  
11 relationship with the Simon Nitinol filter until it bought the  
12 company in 2001.

13 One of the documents I have is a 1997 document, July,  
14 and one of the reasons I brought it -- I'm going to show it to  
10:57:33 15 the Court -- was it's called a line extension document, which  
16 is a 36-page document which does a complete comparison between  
17 the Simon Nitinol filter and what they call the trademark  
18 device which was going to become the Recovery filter, because  
19 they had to do that. They had to show this equivalence.

10:57:50 20 On page 36, this -- again, this is July 17, 1997,  
21 "Currently there are two divisions of C.R. Bard, Inc.  
22 responsible for worldwide distribution of the original  
23 Simon Nitinol filter and the modified trademark filter  
24 systems."

10:58:05 25 That's the Recovery. They're already involved with



10:58:07 1 the Recovery filter in 1997.

2 "Each of these two divisions is required to be on the  
3 label to satisfy European and U.S. labeling requirements. The  
4 European distributor has been placed first on the label under  
10:58:21 5 the distributor section of the label to facilitate the  
6 identification of the authorized representative."

7 Under "Product Labels." "The content and layout of  
8 labels are the responsibility of NMT." That's the company  
9 that Bard purchased. "Label specifications are generated by  
10:58:37 10 NMT according to internal system procedures and mutually  
11 approved by NMT and the distributor, C.R. Bard, Inc."

12 So I think it's important for the Court to understand  
13 that when they say that Bard was not really involved in this  
14 product until 2001 or whatever it was that they took over,  
10:58:56 15 they were involved with every aspect of both the Simon Nitinol  
16 and the Recovery.

17 The part I want to address, we had discussions with  
18 Mr. North. We don't want -- we don't need all that marketing  
19 material for the first eight, nine, ten years. We want the  
10:59:13 20 marketing material once they start marketing the devices that  
21 are subject of this litigation, just to see the comparisons  
22 between the representations that are being made to the outside  
23 world about those two devices versus what they might be  
24 representing to each other internally about those devices.

10:59:32 25 And, again, Mr. North says, We did a search. We

10:59:36 1 don't know what he produced. We don't know whether or not he  
2 thought he was doing us a favor by giving us some  
3 Simon Nitinol filter based on his notion of the relevance of  
4 that device. I think that -- and I think Mr. Stoller will  
10:59:51 5 address how we might be able to get electronically through  
6 some of those searches that we would like to them to do, but I  
7 think its fair to say based on the evidence that I have and  
8 that I've already discussed, and everything I've said is  
9 either in a document or in a deposition I was prepared to show  
11:00:07 10 the Court today, there are misrepresentations and  
11 misrepresentations regarding the Simon Nitinol filter and all  
12 of the other devices.

13 And Mr. North keeps sayings that the predicate device  
14 is the device before. Again, I have a document that says all  
11:00:24 15 of these are supposed to be comparable or equal to or better  
16 than the Simon Nitinol filter. All of them. Not just the  
17 Recovery.

18 I'm just trying to think if there are any other  
19 issued he raised. I think not, but if the Court has any  
11:00:41 20 questions at this point, I'd be happy to answer them.

21 THE COURT: Well, there are five categories --  
22 actually six, addressed -- wait a minute.

23 Six categories addressed in the matrix. One,  
24 regulatory communications, there's no dispute on. You've  
11:01:10 25 indicated that defendant has agreed to search for those.

11:01:16 1 Another two are the design materials and the testing  
2 materials. And, as I've indicated, I have trouble  
3 understanding how that's very relevant to what the plaintiffs  
4 want to show in this case.

11:01:28 5 MR. LOPEZ: As long as -- I can deal with that real  
6 quick.

7 THE COURT: Yeah.

8 MR. LOPEZ: We do have some comparative testing.  
9 Obviously we want comparative testing if there's --

11:01:35 10 THE COURT: I'm going to get to comparative in a  
11 minute. Because the other three categories are sales and  
12 marketing, comparative information, and internal  
13 communications. But it's a very broad internal communications  
14 request. It's internal communications regarding the other  
11:01:51 15 five subjects and efficacy, performance, and safety. And I  
16 think the word "all" is used. All internal communications.  
17 That is a very broad request.

18 It seems to me that sales and marketing is relevant  
19 because part of the plaintiffs' case will be an allegation  
11:02:11 20 that Bard was misrepresenting the safety of the retrievable  
21 filters by comparison to Simon Nitinol.

22 It seems to me the comparative information is  
23 relevant. That is, how Simon Nitinol really compared to the  
24 other retrievable filters.

11:02:29 25 And it seems to me that some internal communications

11:02:32 1 on those subjects are relevant. But the problem is how do you  
2 put those into a manageable scope? I don't pretend to have  
3 the ability to do that, and I don't want to venture out and  
4 start drawing lines because I know less than you all do about  
11:02:49 5 it.

6 What I think I would recommend, and I'll get your  
7 reaction, is that you address those three subjects, sales and  
8 marketing, comparative information, and internal  
9 communications, and plaintiffs be very precise and reasonable  
11:03:05 10 in what it is you want. Defendants can respond. And if you  
11 can't agree, put it in the matrix that you're going to give me  
12 on April 15th, and I'll give you a decision.

13 MR. LOPEZ: Let me address this, because I think  
14 Mr. North said something that I think is worth focusing on,  
11:03:20 15 and that there is really not a lot of activity going on with  
16 the Simon Nitinol filter during this period of time.

17 I guess the issue here, and we haven't heard any of  
18 that, I don't know what the burden is. I don't know whether  
19 or not they've done a search of everything that's  
11:03:37 20 Simon Nitinol related and it's in a -- it's one gigabyte or --  
21 a small volume.

22 THE COURT: That's exactly what you ought to be  
23 talking about. I mean, in my earlier case management order on  
24 ESI generally, I said you got to communicate, and the  
11:03:53 25 defendants need to tell the plaintiff your system location,

11:03:56 1 your system architecture, what exactly you got from the people  
2 you interviewed back in 2005, so that you can have an  
3 intelligent discussion about what the discovery requests are  
4 to be. That's exactly the kind of discussion you should have  
11:04:08 5 about the Simon Nitinol information.

6 MR. LOPEZ: I think the reason I brought it up is  
7 because you were asking me to define documents more  
8 specifically than a broad category and I -- that would be like  
9 me knowing what documents they might have where they're doing  
11:04:25 10 these comparisons or they're responding to Dr. Ciavarella, and  
11 where that takes -- and I would ask we start with what is the  
12 burden. And I think we've all seen the significant relevance  
13 of the Simon Nitinol filter to all of the devices that are  
14 part of this case.

11:04:42 15 THE COURT: When you say "what is the burden," you  
16 mean how burdensome is it?

17 MR. LOPEZ: In other words, do they already have  
18 these set aside? I mean, is the volume either 1 percent of  
19 the entire production? We don't know.

11:04:53 20 THE COURT: It seems to me, Mr. Lopez, that it's  
21 pretty obviously burdensome. If you want all communications  
22 during the life of the Simon Nitinol filter regarding this  
23 range of subjects, that, to me, is vast. I'll be willing to  
24 bet you a doughnut that they don't have a file sitting over  
11:05:13 25 there labeled "All communications about Simon Nitinol filter

11:05:17 1 for the last 25 years."

2 MR. LOPEZ: I'll take your doughnut and raise you a  
3 doughnut. I think they probably do.

4 THE COURT: Why do you think they do?

11:05:24 5 MR. LOPEZ: They know how significant the  
6 Simon Nitinol filter device is in this case. I mean, I have a  
7 feeling they've seen everything we want to see and they've  
8 analyzed it, and that's why we're getting the resistance we're  
9 getting to getting any more than they've already given us.

11:05:40 10 THE COURT: Well, I'm not so suspicious as you are.

11 MR. LOPEZ: Okay.

12 THE COURT: I think simply my blessing your request  
13 for all communications is unreasonable because that sounds to  
14 be to me very broad and burdensome. Same thing for all sales  
11:05:52 15 and marketing materials.

16 Now, neither do I agree that the defendants should be  
17 able to identify and decide on the representative sample  
18 they're going to produce. It's not a matter of the defendants  
19 picking and choosing what information they're going to  
11:06:07 20 disclose.

21 But I think you have to have a discussion about  
22 what's been done to find this material. Plaintiffs, fashion  
23 your best request. Defendants, if you disagree, give me the  
24 disagreement, and then I can make a decision. But until we  
11:06:19 25 have that discussion, I think any decision I make is bound to

11:06:23 1 be wrong in one direction or the other.

2 MR. LOPEZ: Okay. I understand, Your Honor.

3 Something we -- we have depositions that are starting maybe

4 the same timetable. I can actually get this done by a week

11:06:34 5 from tomorrow, maybe, to get this done by Friday and have --

6 THE COURT: I understand that. My only problem is  
7 going to be I'm unavailable basically for the next three weeks

8 because of this other case that starts Monday morning. I

9 really am not even on evenings or weekends going to have time

11:06:53 10 to look at your matrix. I think I will, as I indicated,

11 during the week of April 18th, because the trial -- I think

12 the trial will end during that week.

13 MR. LOPEZ: Well, just as a practical matter, may I  
14 suggest -- and we're going to try to do this with some other

11:07:09 15 issues, too -- to the extent Mr. North and we can agree on

16 what additional things he agrees to produce, maybe have him

17 produce those now --

18 THE COURT: Sure.

19 MR. LOPEZ: -- and then make the issue what is left  
11:07:21 20 that we want that he doesn't want to give us.

21 THE COURT: I absolutely agree we ought to be moving  
22 ahead with discovery where there's agreement.

23 All right. So just to summarize, the three  
24 categories that I think are relevant are sales and marketing,  
11:07:36 25 comparative information, and internal communications that

11:07:40 1 relate primarily to those subjects. I cannot see much  
2 relevance in the design and testing of Simon Nitinol for the  
3 reasons I've stated. So focus on those three in your  
4 discussions.

11:07:52 5 MR. LOPEZ: Okay. Thank you, Your Honor.

6 THE COURT: I'd like to talk next about the privilege  
7 log issue.

8 Let me get the right materials.

9 I want to talk to you first about the supplemental  
11:10:35 10 joint report that you filed on February 12th about the  
11 privilege log efforts. It's Docket 705. It's the document  
12 where you describe the procedures you had agreed upon.

13 I appreciate the efforts you've been making on this  
14 issue.

11:10:53 15 I want to make sure I understand your procedure. In  
16 this report from February 12th, on page 2 in paragraph A, you  
17 talk about the fact that you have been continuing to work on  
18 the documents that were the prior sampling, and you proposed a  
19 briefing schedule and the first motion has been filed, as was  
11:11:24 20 suggested on March 25th. And I've read that. I want to talk  
21 to you about that in a minute.

22 But part B on page 2 is a little confusing to me.  
23 You have two lists of categories on pages 3 and 4. One is the  
24 plaintiffs' proposed categories. The second is Bard's  
11:11:55 25 proposed categories. And you say that by April 29th, Bard



11:12:04 1 will produce a list of the entries responsive to each of its  
2 categories, and plaintiffs will do the same with respect to  
3 their categories. And then after you do this, you'll randomly  
4 select 25 entries from each category.

11:12:21 5 I don't understand the categories. When I look at  
6 the plaintiffs' list, I understand, or think I understand what  
7 the plaintiffs are suggesting. For example, in category I,  
8 entries where no legal personnel are listed as either author  
9 or recipient of the communication. I'm assuming plaintiffs  
11:12:42 10 are saying there's a bunch of that category in the privilege  
11 logs, we think it's not privileged because there's no legal  
12 personnel listed; therefore we want to test some of it.

13 I don't understand Bard's categories. Why is Bard  
14 coming up with categories? I mean, for example, Bard has a  
11:13:05 15 category of documents -- well, communications to and from  
16 outside counsel. Isn't that evident from the privilege log?  
17 Why are you creating a category to put documents into, and  
18 then why are we sampling those documents? You're not  
19 contending they're not privileged? They're not identifying  
11:13:26 20 that category. I'm --

21 MR. NORTH: I must admit I have not been directly  
22 participating in that. Mr. Combs, on behalf of the  
23 plaintiffs, has been dealing with my partner, Kate Helm.

24 My understanding -- and Mr. Combs can correct me if  
11:13:43 25 I'm wrong, but my understanding is the -- those are categories

11:13:47 1 that they are challenging that we believe are indeed  
2 privileged or subject to work product protection --  
3 protection. And that that was just to help provide a  
4 framework for the future meet and confer that's going to go on  
11:14:02 5 for the next two months. And that's my understanding.  
6 Subject to any correction we have here.

7 MR. COMBS: Your Honor. Yeah, I think that's right,  
8 Judge. The idea was that each side would come up with some  
9 categories as a way to then either reach some resolution among  
11:14:25 10 us from some sampling of those categories, or get -- more  
11 likely, unfortunately, because we've already had extensive --  
12 dozens of hours of meet and confer, and as you see what we  
13 left with in our motion to compel, get some categorical  
14 rulings from you that will then help us evaluate the rest of  
11:14:45 15 the privilege log.

16 And I can speak as to why they picked those  
17 categories, but that was just the deal, that we would do  
18 categories and they would do categories.

19 I think their thought was if we can get clarity on  
11:14:56 20 our categories, those would be kind of off the table for  
21 further challenge from plaintiffs. But I don't want to speak  
22 too much for defense counsel.

23 Thank you.

24 THE COURT: All right. And it's Mr. Combs; right?

11:15:08 25 MR. COMBS: Yes, Your Honor.

11:15:09 1 THE COURT: Just we didn't identify you at the  
2 beginning.

3 MR. COMBS: Yeah, Lincoln Combs, Your Honor,  
4 Gallagher & Kennedy.

11:15:17 5 THE COURT: Right. Mr. Combs, I'm still not  
6 understanding the defendants' categories. You have category 1  
7 that I just described, documents -- actually, it wasn't  
8 category 1 that I just described.

9 Let's use that. Bard's category, documents created  
11:15:36 10 directing actions to be taken or describing actions taken as a  
11 result of the threat of or filing of lawsuits.

12 And Bard is going to identify the documents in that  
13 category, not plaintiffs --

14 MR. COMBS: Correct.

11:15:57 15 THE COURT: -- right?

16 But then we're going to pick at random 25 of them  
17 to -- if they're not in one of your categories of what's not  
18 privileged, why are we having Bard create a category and  
19 having Bard put documents in that category?

11:16:13 20 MR. COMBS: That was the way my colleague Kate Helm,  
21 Mr. North's partner, wanted to do it, Your Honor, and that  
22 came from extensive meet and confer discussions, and that was  
23 the deal she wanted.

24 THE COURT: But how does it help -- I mean, if you're  
11:16:26 25 not -- well, are you -- maybe this is the question. Are you

11:16:30 1     contending that documents created -- "created" may be a  
2     typo -- documents directing actions to be taken or describing  
3     actions taken as a result of the threat of or filing of  
4     lawsuits, are you claiming those are not privileged or work  
11:16:49 5     product?

6             MR. COMBS: They could be, Your Honor. I think the  
7     testing, at least on our end, would be to make sure that's  
8     what they truly are. The sampling, and then more extensive  
9     discussion of those.

11:17:03 10            THE COURT: Well, is there -- are you working off a  
11     list of everything you dispute? Is that what we're doing?  
12     There's this long list of everything you dispute and Bard is  
13     going to pick some of those and put it into this category? Or  
14     are they just going to go to their privilege log and say  
11:17:21 15     everything in our privilege log that's in this category, we'll  
16     identify. Well, maybe 75 percent of that you don't dispute.  
17     So why are we putting that into a category to be sampled?

18            MR. COMBS: You'd have to ask those questions of  
19     defense counsel. But, like I said, this was the procedure  
11:17:34 20     that we agreed to to get through -- try to get through this.

21            And it actually is the latter, Your Honor. It's the  
22     entire privilege log we're going to try to categorize this  
23     way.

24            THE COURT: Can you help me, Mr. North?

11:17:48 25            MR. NORTH: As I understand what's going on, these

1 are categories we picked because we think they are clearly  
2 privileged, but there have been -- they are contesting  
3 virtually every entry on the privilege log, as I understand  
4 it. And we're trying our best to come up with broad  
5 categories that we think are clearly privileged that ought to  
6 be -- ought to be taken off the table, and this is just trying  
7 to provide a framework for this meet and confer that's being  
8 scheduled.

9 THE COURT: Well, so there are seven Bard categories.  
10 Are you going to put every document listed on your privilege  
11 log into one of those seven categories?

12 MR. NORTH: No, Your Honor.

13 THE COURT: What's the set you're going to start with  
14 before you start assigning them to categories?

15 MR. NORTH: My understanding is that each side is  
16 going to pick 25 documents that they believe --

17 THE COURT: That's after it's in the categories, as I  
18 read this.

19 MR. NORTH: Right.

20 THE COURT: You're going to categorize them, and then  
21 somehow you'll pick 25 from each category to discuss.

22 MR. NORTH: Right.

23 THE COURT: Well, so are you starting with everything  
24 in the log and putting that into your seven categories? And  
25 if not, what is the subset you're going to put into the seven

11:19:00 1 categories?

2 MR. NORTH: I don't think everything in the privilege  
3 log will necessarily fit just within those seven. But those  
4 are the seven ones for this sampling process, major categories  
11:19:15 5 we were going to utilize.

6 THE COURT: Go ahead.

7 MR. LERNER: Your honor, I think that the  
8 categories -- my understanding is that the categories on the  
9 defense side are things that the plaintiffs have challenged,  
11:19:23 10 so they're not things we're picking out. They're based on  
11 documents they have challenged themselves, so we made these  
12 broad categories. That's my understanding.

13 THE COURT: That's Mr. Lerner; right?

14 MR. LERNER: Yes, Your Honor.

11:19:37 15 THE COURT: Is it your understanding, Mr. Lerner,  
16 that -- let's say, just to pick a number, there are 140  
17 documents that the plaintiffs are disputing. I know it's a  
18 much higher number. But let's say the total universe is 140.  
19 Is it your understanding that the 140 will be taken and  
11:19:52 20 assigned to the seven categories you've identified and every  
21 one of them will wind up in some category?

22 MR. LERNER: That's --

23 MR. COMBS: I don't think that's correct, Your Honor.  
24 Plaintiffs have not said we're challenging every entry on the  
11:20:11 25 privilege log. This was just a means to try and organize the

11:20:15 1 privilege log so that challenges could be further vetted.

2 And as a practical matter from our perspective,  
3 Your Honor, we wanted our categories -- we want to do sampling  
4 on our categories. This was what defense counsel wanted in  
11:20:28 5 return for us having that procedure. We said fine. There's  
6 some categories there that, if that can clarify things and get  
7 either more meet and confer discussions or rulings from you  
8 that help us, great. But obviously we were more focused on  
9 our categories, which we do want to divvy up the privilege log  
11:20:48 10 and challenge.

11 THE COURT: Well, that's not what I'm understanding.  
12 Why are we going to be sampling and evaluating anything other  
13 than what you want to put in a category? That's the stuff you  
14 care about in this challenge. Aren't we just creating more  
11:21:00 15 work for ourselves if we're --

16 MR. LERNER: Your Honor, I think the documents  
17 they've challenged individually would fill in those buckets.  
18 So the defense bucket, my understanding, were created based on  
19 documents they said they were challenging. So it's not like  
11:21:13 20 we're picking documents necessarily. We're picking documents  
21 that they have challenged, and we're creating those buckets.  
22 That's what the defense side buckets are.

23 THE COURT: Well, so are we going to have the same  
24 document in a defense bucket and a plaintiff bucket? And if  
11:21:28 25 so, aren't we duplicating our work?

11:21:31 1 MR. COMBS: Could be, Your Honor.

2 THE COURT: Well, let me ask this question,  
3 Mr. Combs. The seven categories you've got on page 3, is that  
4 the universe of issues you've identified in terms of your  
11:21:44 5 concerns about the privilege log?

6 MR. COMBS: I wouldn't say it's the entire universe,  
7 but it could be. Once we get through those, maybe that will  
8 resolve everything. But there may be -- obviously there could  
9 be a specific unique category or document, but that's going to  
11:21:58 10 be -- the vast majority, yes.

11 THE COURT: Okay. So it includes the vast majority.  
12 Why don't we just deal with those categories, then? Let's  
13 forget the Bard categories. Let's have -- let's take the  
14 plaintiffs' seven categories, put the disputed documents into  
11:22:13 15 those categories, sample them, see if you can reach agreement.  
16 If not, I can rule on the seven categories. But why deal with  
17 another seven categories?

18 MR. NORTH: Your Honor, I don't see a problem with  
19 that. It was just a mechanism, rightly or wrongly, that was  
11:22:34 20 attempting to take broad groups of documents off the table.

21 THE COURT: And I'm all for that, I just worry if  
22 we're overstating the start, we're going to be overstating the  
23 end, and we'll be creating more work than we need to. You  
24 understand my issue on that.

11:22:49 25 MR. NORTH: Right. Why don't we proceed as the Court



1 suggests, just focusing on the plaintiffs' categories, and  
2 then we can come back to the Court if there's a problem after  
3 that.

4 THE COURT: Well, and if it's true there's another 5  
11:23:00 5 or 10 percent of the privilege log disputed documents that  
6 aren't in those categories, we can deal with those after. But  
7 let's start with these seven categories and deal with them.

8 MR. COMBS: That obviously would be fine for  
9 plaintiffs, Your Honor.

10 THE COURT: Okay. Now, I'm not done on the privilege  
11 log. You can go ahead and have seat. There's another  
12 question I want to ask, but let me make a note first.

13 All right. The other -- well, let me read my notes  
14 to make sure I'm right before I say it.

15 I have a question on the motion to compel, which is  
16 Docket 1214. Attached to the motion to compel is this exhibit  
17 that identifies documents, gives their date, author,  
18 recipient, et cetera, a description of the communication, and  
19 then a paragraph basis for the challenge, which is presumably  
11:25:18 20 plaintiffs' challenge to the document.

21 MR. COMBS: Correct, Your Honor.

22 THE COURT: You say in footnote 2 of your brief it is  
23 hoped that this mechanism can easily be transitioned into a  
24 matrix style summary of the dispute. But you filed the motion  
11:25:33 25 to compel. So are you wanting me to get the motion briefed

11:25:36 1 and ruled, or do you want to not do it by motion, do it by  
2 matrix? I wasn't understanding what that meant.

3 MR. COMBS: I think the idea was both, Your Honor, is  
4 to have legal argument in the motion, and then have the  
11:25:48 5 matrix. I've communicated with my colleague, Ms. Helm, this  
6 morning and sent her a copy of that Excel spreadsheet so they  
7 can add their paragraph response, and then, if necessary, we  
8 can add a paragraph reply and -- but I think there's  
9 generally -- obviously there's somewhat of a categorical  
11:26:06 10 approach in the brief, and there's case law and citations and  
11 authority and argument that will help guide the individual  
12 determination.

13 MR. BRENES: And, Your Honor, this is Troy Brenes for  
14 the plaintiff. I helped brief the motion.

11:26:22 15 Obviously we're dealing with a large number of  
16 documents, I think it came out to 132, and my thought was the  
17 spreadsheet was -- it was probably the method that made the  
18 most sense so you could get a quick and easy snapshot of what  
19 the document was.

11:26:37 20 So the information provided is everything that was  
21 listed on the privilege log, and then just a quick paragraph  
22 of why we're challenging the document.

23 THE COURT: All right. Well, here's the concern I  
24 have about the motion. I've read the motion. The motion  
11:26:54 25 identifies several categories of documents that you think are

11:26:59 1 not privileged. For example, on page 6, documents that are  
2 not a request for or the rendering of legal advice from an  
3 attorney.

4 On page 8, communications with outside counsel where  
11:27:18 5 the attorney was not acting as a lawyer.

6 Page 9, documents where the primary purpose of the  
7 communication was not to obtain or render legal advice,  
8 et cetera.

9 And there's several categories.

11:27:34 10 The spreadsheet at the end doesn't track those  
11 categories directly. There's arguments in the argument  
12 section that aren't in the categories, and there's 133, by my  
13 understanding, documents. I have trouble with the notion that  
14 I'm supposed to read this brief, and then sit down and review  
11:27:56 15 133 documents that would likely be thousands of pages and make  
16 a ruling. Both because we don't have complete correlation  
17 between the arguments in the brief and what's in the  
18 attachment, the spreadsheet, and because of 133 documents.

19 So this is the question that -- or the idea that I  
11:28:22 20 wanted to address.

21 If what you're looking for is guidance from me on  
22 what I think is or is not privileged, I don't think I need to  
23 review and rule on 133 documents to give you guidance.

24 What if we were to take these six or seven  
11:28:51 25 categories, and you can do the legal briefing on why you think

11:29:01 1 that category is or is not privileged or work product, and  
2 then identify five documents in each of the categories that I  
3 can review out of the 133. And then I can read the legal  
4 arguments, I can look at the five documents, I can give you my  
11:29:19 5 ruling and make it specific to those five documents. You'll  
6 get rulings on 25 or 30 different documents and on the  
7 categories in the brief that you could then use in your  
8 further discussions.

9 I guess my question is would that advance the ball?  
11:29:34 10 I'm concerned about a couple of things.

11 One is it looks like this is headed toward somebody  
12 ultimately reviewing several hundred, maybe more, documents to  
13 make a privilege call. If that's going to be the task, if  
14 we're going to get to 3- or 400, I don't have time to do that  
11:29:51 15 and my law clerks don't have time, so we'll probably need to  
16 get a special master on board sooner rather than later. Maybe  
17 you'll make decisions in light of the guidance I give.

18 And I'm also concerned that under the schedule that's  
19 in Docket 705, we're not even going to finish briefing on the  
11:30:07 20 second round until sometime in July. So we're really sort  
21 of -- if I rule in August, we're -- we've only got a few  
22 months left in the discovery period at that point.

23 So I guess I'm wondering if we should sort of cut to  
24 the chase, have me get through and rule on these five, have  
11:30:27 25 you discuss if there's still wide divergence, let's get a

11:30:32 1 special master in, give them the guidance I've given, give  
2 them all the disputed documents, and you all can pay that  
3 special master, him or her, to go through and say what is or  
4 is not privileged. And get it done by the end of May rather  
11:30:44 5 than waiting until August.

6 I'm interested in your reactions.

7 MR. COMBS: Your Honor, I wholeheartedly agree with  
8 everything you said. I think the exercise in briefing the 133  
9 was still useful. It's something we'd probably have to do at  
11:31:02 10 some point anyway, but that guidance and your plan sounds  
11 great. It would have been great to hear it a couple of weeks  
12 ago so Troy and I wouldn't have had to have been up all night.

13 But, no, I think that's an excellent plan,  
14 Your Honor. And I certainly agree -- our main concern at this  
11:31:17 15 point is expediency and not overly delaying discovery of these  
16 privileged materials to the extent that they are discoverable.

17 THE COURT: Thoughts from defense counsel.

18 MR. NORTH: Your Honor, I think that makes sense. I  
19 would suggest that if they define those categories and -- I  
11:31:37 20 like the Court's idea of five in each, but I think the defense  
21 ought to be able to, from that 130 that they're still  
22 challenging, choose maybe two of the five for each category so  
23 that they're not able to bias their best five.

24 THE COURT: I understand.

11:31:53 25 Well, okay. What I'm going to do on this, I think,

11:31:57 1 is -- in my order, I will lay out this procedure. I'm going  
2 to identify the categories I see in the plaintiffs' brief so  
3 you know exactly what you're going to be responding to on  
4 behalf of the defendants.

11:32:29 5 The defendants' brief on this issue is scheduled for  
6 April 8th, which is middle of next week. I will get you an  
7 order on this tomorrow so that you can recraft your brief to  
8 make sure it's addressing those categories. And all it needs  
9 to do is address the categories. It doesn't need to talk  
11:32:49 10 about specific documents. Unless you can get the documents  
11 picked before April 8th.

12 And the reply brief on April 22nd can probably be  
13 done in a little less time than that, it seems to me.

14 MR. COMBS: Your Honor, would it help if we -- we can  
11:33:14 15 do it by tomorrow, pick five entries for each category and  
16 submit a supplemental brief just listing for those six or  
17 seven subsections in the brief, here are the five examples. I  
18 mean, there's one or two examples, I think, for most of them  
19 already. And then plaintiffs can -- I mean defendants can  
11:33:33 20 respond next week in their response brief.

21 Just the idea being to move this along, the concern  
22 Your Honor raised, which plaintiffs certainly share.

23 THE COURT: Hold on just a minute.

24 MR. COMBS: Your Honor, may I make one point before  
11:36:53 25 you finish?

11:36:55 1 THE COURT: Yeah. Hold on a minute.

2 MR. COMBS: Sure.

3 THE COURT: Go ahead, Mr. Combs.

4 MR. COMBS: While you were writing, Mr. Boatman

11:38:12 5 raised a good point with me. They want to submit two of their

6 documents I guess are the most privileged in each category. I

7 don't think that's proper, Your Honor, since they've

8 designated these as privileged, all of them, so they should

9 all have proper bases. They shouldn't be allowed to pick and

11:38:30 10 choose.

11 And I feel pretty good about all of 130 or whatever

12 of our challenges. We tried to get as low we could. But I

13 don't think they should be allowed to pick and choose their

14 most privileged documents from that list.

11:38:42 15 THE COURT: Okay. I understand. I disagree.

16 Let me tell you what I'd like us to do, see if you

17 see any problem with this.

18 By Monday, April 4th, I would like plaintiffs to do

19 two things. You can do it in one communication. Send to

11:39:00 20 defendants, number one, your description of the legal

21 categories you've briefed in the motion. That way I don't

22 have to bother putting it in an order.

23 So just make clear -- and they're in the headings of

24 your motion -- what are the five or six legal categories

11:39:16 25 you've briefed so that defendants know exactly what to respond

11:39:19 1 to.

2 And number two, three documents in each of those  
3 categories from the 133 that are still in dispute. So give to  
4 defendants the categories of arguments and the three  
11:39:33 5 documents. That's communication just to the defendants.

6 Then by April 11th, a week later, and I think it can  
7 be done in a week since you're already working on this brief,  
8 I assume, the plaintiffs do three things: One is you file a  
9 memorandum addressing the legal categories. Two, you send to  
11:40:02 10 plaintiff your list of two other documents in each of those  
11 categories. So plaintiff gets the two other documents.

12 MR. STOLLER: Your Honor, you said plaintiffs do  
13 three things.

14 MR. COMBS: Defendants --

11:40:18 15 THE COURT: Sorry. Defendants do three things.

16 So you file your brief on the legal categories,  
17 number one. Number two, you identify two more documents in  
18 each category and tell the defendants what they are. And  
19 number three, you give to defendants a draft matrix that  
11:40:31 20 addresses all five documents in all of the categories with  
21 your summary -- I don't want the argument restated -- of why  
22 this document satisfies your argument on the legal categories.

23 That happens on the 11th.

24 Then, on the 22nd, the defendants file a reply on the  
11:40:52 25 legal issues --



11:40:55 1 MR. COMBS: Plaintiffs, Your Honor?

2 THE COURT: I'm sorry. The plaintiffs file a reply  
3 on the legal issues and give me the completed matrix that has  
4 the summary of each side's arguments for the five documents in  
11:41:07 5 each of the categories.

6 And then I can read the legal arguments and I can  
7 review the five documents in each category and get you my  
8 ruling. And you'll have an indicative ruling on the  
9 categories that have been briefed so far.

11:41:26 10 And then I think what I'm going to do is require you  
11 to meet and confer for a period of time, and then get me a  
12 report on how much is still in dispute, and if it's hundreds,  
13 we're going to get a discovery master in here. A special  
14 master to go through the rest of the documents with legal  
11:41:44 15 guidance.

16 And if there's a couple more categories to rule on,  
17 I'll do it, but I don't want this process to drag out through  
18 the summer. I think we need to resolve it more quickly.

19 Any problems from the plaintiff side on that?

11:41:55 20 MR. COMBS: No. That sounds great for plaintiffs,  
21 Your Honor.

22 THE COURT: How about from defense?

23 MR. NORTH: That's fine, Your Honor.

24 THE COURT: Okay. Let me make just another note or  
11:42:02 25 two here.

11:42:04 1 Mr. Duarte, are you having a slow morning?

2 MR. DUARTE: Your Honor, I want to identify myself as  
3 participating as observer as opposed to full participant, but  
4 thank you, Your Honor.

11:42:19 5 THE COURT: Nice to have you here.

6 Okay. I'll reflect this in the order that comes out.

7 Thanks, Mr. Combs.

8 MR. COMBS: Thank you, Your Honor.

9 All right. I want to talk next about the ESI process  
11:43:50 10 and the new custodians.

11 The report that you filed indicates that with respect  
12 to the ESI process that was outlined in Case Management Order  
13 Number 8, Section 3, the defendants have provided  
14 interrogatory responses on their ESI collection efforts that

11:44:23 15 happened in late February. The defendants have provided  
16 interrogatory responses on corporate culture. There was a  
17 30(b)(6) deposition on corporate -- on corporate structure,  
18 not culture. There was a 30(b)(6) deposition on corporate  
19 structure in mid March. There was an interview on  
11:44:44 20 defendants's information systems scheduled for April 15th.

21 And a 30(b)(6) deposition on information systems for the  
22 entities and departments likely to have discoverable  
23 information set for April 27th.

24 Is that still all correct?

11:45:09 25 MR. STOLLER: Yes, Your Honor.

11:45:11 1 MR. LERNER: Yes, Your Honor.

2 THE COURT: With respect to the new custodians that  
3 we were going to include in the same matrix as the ESI issues,  
4 I learned from your report that there was an interrogatory  
11:45:21 5 answer provided in late February.

6 Has anything else happened on the new custodians  
7 issue? This is the -- part 4 of my order.

8 MR. STOLLER: The short answer to your question,  
9 Your Honor, is no, there's nothing more that's happened on  
11:45:41 10 that. We wanted to complete the other parts of the process  
11 before we turned to those issues because they, to some extent,  
12 rely on -- having discussions about those rely on what we  
13 determine in the first part.

14 THE COURT: Okay. And my understanding is that the  
11:45:54 15 interrogatory response that was provided in late February on  
16 new custodians identified employees who were involved in  
17 Eclipse, Meridian, and Denali, and whose ESI has not yet been  
18 searched; is that correct?

19 MR. LERNER: Yes, Your Honor.

11:46:13 20 THE COURT: And the next step on new custodians that  
21 you say, Mr. Stoller, is waiting until you learn more about  
22 the systems, is for you to identify the specific custodians  
23 from whom you want ESI discovery with respect to those  
24 filters.

11:46:26 25 MR. STOLLER: The idea from our perspective,

1 Your Honor, would be us to have the ability to identify  
2 additional custodians and --

3 From plaintiffs' perspective, Your Honor, the idea is  
4 that once we go through the next step of our ESI discovery  
5 process, hopefully we'll be able to identify whether we have  
6 any issue as to whether there are additional custodians from  
7 whom we think ESI should be collected.

8 I don't think there's anything, and I don't know  
9 whether defendants have taken steps yet to begin collecting  
10 ESI from those that they've already identified.

11 THE COURT: Okay.

12 All right. Well, you filed the joint motion, which  
13 is at Docket 1151, to extend some of the deadlines related to  
14 these two subjects. And specifically you want me to set  
15 May 16th as the new deadline when any disagreements on these  
16 issues will be presented to me in a matrix.

17 I'm going to grant the motion, but I think it's  
18 really important that we finish it by that date. We've got to  
19 get the ESI issues resolved and the discovery underway because  
20 that typically takes time and involves lots of back and forth,  
21 and I don't want to be starting mid summer. We need to get  
22 that underway.

23 So I will grant the motion at Docket 1151, but please  
24 understand we really do need to push this fast enough to get  
25 it resolved by that May 16th date. And I formed that concern

11:48:18 1 just because it's evident to me that there's been some delay  
2 in what you've been trying to do just scheduling things such  
3 as the 30(b)(6) deposition that can't happen until late April,  
4 but let's do whatever we need to so that you can get those  
11:48:30 5 issues to me by May 16th.

6 Is there anything else we need to talk about on ESI  
7 and the new custodians?

8 MR. STOLLER: Not at this time, Your Honor.

9 MR. LERNER: Your Honor, the only other issue I -- I  
11:48:42 10 think the initial protocol that we submitted right after the  
11 last conference may not have been entered yet. The ESI  
12 protocol and format.

13 THE COURT: I thought that did get entered. Have you  
14 not seen it in the docket?

11:48:58 15 MR. LERNER: I may have missed it, but I don't know  
16 if I have seen it.

17 THE COURT: Did you see it, Mr. Stoller?

18 MR. STOLLER: I'll be honest, Your Honor, I don't  
19 know one way or the other, but I can find the answer by the  
11:49:02 20 time I get back to my office this afternoon. If we haven't  
21 seen it, I can alert your judicial assistant that we haven't  
22 seen it, and submit another Word version of it to make sure  
23 you guys have it.

24 THE COURT: Yeah. I reviewed it and approved it. If  
11:49:14 25 it didn't get filed, let us know and we'll get it filed.

11:49:20 1 MR. LERNER: Thank you, Your Honor.

2 THE COURT: Let's talk next about the mature cases.  
3 You filed a stipulation which is at Docket 914. You have  
4 removed three cases from the mature case list, that's Conn,  
11:50:15 5 C-O-N-N, Milton, and Mintz, M-I-N-T-Z, cases.

6 Is my understanding correct that those three cases  
7 just go back into the general group of MDL cases?

8 MR. BOATMAN: Yes, Your Honor.

9 MR. NORTH: Yes, Your Honor.

11:50:32 10 THE COURT: Okay. Do we need to do anything special  
11 with those with respect to things that other cases in the MDL  
12 have been doing in terms of information exchanges, or is it  
13 enough to just say they're off the mature case list?

14 MR. LOPEZ: I think that's probably enough,  
11:50:53 15 Your Honor.

16 THE COURT: Okay.

17 And then you indicate that the other ten which will  
18 remain on the mature case list, as I understand it, may be  
19 ready for remand after the FDA warning letter and the  
11:51:21 20 Kay Fuller discovery is done. Is that accurate? Is that what  
21 we're waiting for on the other ten mature cases?

22 MR. BOATMAN: I think that was the idea, Your Honor.

23 MR. NORTH: Yes, Your Honor. Mr. Boatman and I, I  
24 think, are going to talk in the near future about whether case  
11:51:38 25 specific discovery, because there's a few little minor things

1 on some of those cases, ought to be completed now or after  
2 remand. But he and I will discuss that and report back.

3 THE COURT: Okay.

4 What I'm going to do before we leave today is set  
5 another case management conference, and I'll provide in my  
6 order that you should get a status report on those mature  
7 cases in connection with the next case management conference.

8 Let's talk about the bellwether selection process.

9 I've read it. I think it is a reasonable approach,  
10 but I have some questions.

11 There was a -- at the beginning of this stipulation,  
12 you indicated that the initial plaintiff pool will consist of  
13 all of the cases filed as of today.

14 And the plaintiffs are going to provide profile forms  
15 by May 1st. It said defendants will provide profile forms  
16 within 30 days after that unless there are more than 350  
17 cases. There are now more than 350 cases. I don't know what  
18 today's count is, but as of two days ago it was 376.

19 So how much time do you think you need, Mr. North, to  
20 provide the plaintiff profile forms?

21 MR. NORTH: Your Honor, I would say just another week  
22 unless we have a huge deluge this afternoon at the closing  
23 bell, so to speak. But --

24 THE COURT: We have one more --

25 MR. NORTH: We may be able to get them all done

11:53:33 1 within the month. We'll try our best. I just wanted to put a  
2 safety valve that Mr. Stoller and I talked in there because I  
3 didn't know if we could have 350, 600, or what we were going  
4 to have at this point.

11:53:46 5 THE COURT: Okay. Let's say 40 days instead of 30  
6 for you.

7 MR. NORTH: Okay.

8 THE COURT: And what I'm going to do, by the way, is  
9 we're going to talk through and make a few tweaks. I'm going  
11:53:56 10 to have you then submit to me a form of order on the  
11 bellwether reflecting the stipulation that's in here so we can  
12 just enter it, and having attached to it the fact sheets.  
13 That way we don't have to create the order. I'm just going to  
14 have you submit it in light of the changes we made.

11:54:15 15 MR. NORTH: Yeah, and we actually discussed doing  
16 that, wanting to go to through this process with Your Honor  
17 today to figure out what you wanted for the bellwether and  
18 perhaps submitting a combined CMO on the bellwether and the  
19 fact sheets.

11:54:26 20 THE COURT: Right. That's what I'm looking for after  
21 we finish today.

22 You then provide that 20 days after the plaintiff  
23 has -- I'm sorry, the defendants have provided their profile  
24 form, you will exchange lists of 24 to identify this, what you  
11:55:02 25 call the PFS/DFS group of --



11:55:08 1 MR. NORTH: Group 1.

2 THE COURT: -- of 48 cases.

3 And then plaintiffs, within 30 days of that exchange,  
4 will provide the plaintiff fact sheets, and defendants 30 days  
11:55:23 5 later will provide the defendants' facts sheets. That all  
6 sounds fine.

7 Well, we'll come back to the fact sheets in a minute.

8 But here's a question that occurred to me. You don't  
9 say anything in the stipulation about *Lexecon* waivers.

11:55:45 10 Are we going to start down this road of identifying  
11 these 48 cases only to find when it comes to actual selection  
12 of bellwethers that 70 percent of them won't get *Lexecon*  
13 waivers, and so we can't do a bellwether trial?

14 When do we clear that hurdle? I mean, we're going to  
11:56:04 15 be doing a lot of work on cases that may not be subject to a  
16 bellwether if we don't know there's a *Lexecon* waiver. Unless  
17 I'm missing how you intend to do these bellwether trials.

18 MR. STOLLER: Your Honor, we had not discussed  
19 *Lexecon* waivers as part of the bellwether process. And  
11:56:25 20 obviously -- I'll tell you the plaintiffs' perspective, it was  
21 if we try cases in individual jurisdictions that have gone  
22 through the process with Your Honor, we'd obviously prefer to  
23 have cases tried here, but we can't commit individual  
24 plaintiffs and individual attorneys to those waivers, unless,  
11:56:41 25 of course, they're going to be part of the process, we could

11:56:44 1 require that.

2 But the thought being that we could -- some of those  
3 could still be tried in their home jurisdictions and still  
4 serve as bellwethers, but the other thing that happens in the  
11:56:55 5 process that the parties have devised, Your Honor, is that  
6 we're going to get down to a pool of 48, and then down to  
7 12 -- or down to -- yeah, down to 12 and down to six, and as  
8 part of that, you can winnow out cases, I suspect, where if  
9 what Your Honor says is, Look, I'm only going to include in  
11:57:13 10 the bellwether process those who waive *Lexecon*, we would end  
11 up winnowing out those cases as part of that process.

12 THE COURT: Well, my concern is if we don't get  
13 *Lexecon* waivers -- well, let me start somewhere else.

14 I view the bellwether process as part of the MDL. It  
11:57:32 15 is part of trying to resolve the MDL. We do the bellwether  
16 trials precisely so we can see if that helps resolve the  
17 collection of cases, so that it ought to occur before remands  
18 go back to all of the home districts.

19 If we're sending them home for the trials, I lose  
11:57:46 20 complete control over when that trial occurs. I can say,  
21 Okay, here's our five bellwethers, we'll send them home, and  
22 the judges say, Great, we'll get to them in a year and a half.  
23 I don't want that to happen.

24 If we're going to want to have bellwether trials, I  
11:57:59 25 want to do it on my schedule as part of the MDL.

11:58:03 1 Now, I know there's a procedure sometimes where I can  
2 get cross-designated to go try it in the home district. That  
3 sounds complicated.

4 But if we're doing bellwether trials as part of the  
11:58:16 5 MDL, I think they need to be tried by me on the schedule we  
6 set so that we do it as part of getting the MDL resolved, and  
7 I see *Lexecon* waivers as being an obstacle. So it may be in  
8 other MDLs you've had experience with this not being a  
9 problem, but I see it as an issue that we're going to do all  
11:58:39 10 this preparation on all these cases without knowing whether  
11 any one of them will really be able to be a bellwether trial.

12 MR. STOLLER: And I think, Your Honor, creates a  
13 significant issue at the outset because we all will have fact  
14 sheets from how many of our cases we have, and each side is  
11:58:56 15 going to be selecting from those, and we would have to have in  
16 advance of that selection affirmative waivers for anyone to be  
17 considered.

18 Probably less of an issue for plaintiffs in a sense  
19 than it is for defendants.

11:59:12 20 THE COURT: Are you're going to be doing -- the fact  
21 sheets are a lot of work, but you're going to be collecting  
22 documents, you know, for each of these plaintiffs from their  
23 medical providers. You're going to be doing a lot of work on  
24 cases that maybe won't be a bellwether because the plaintiff  
11:59:27 25 won't waive *Lexecon*.

11:59:29 1 MR. STOLLER: Well, and that's the point, Your Honor,  
2 is that it seems to me, based upon what you're saying, if your  
3 view is that the complications with plaintiffs or cases going  
4 back to the original jurisdictions is not something you want  
11:59:42 5 as part of the bellwether process, that you want only those  
6 cases in which *Lexecon*'s going to be waived, I think we have  
7 to have that at the very first step, because we're going to be  
8 selecting the pool of 24 each or the original pool of 48 from  
9 whatever we have, 360, 370, let's call it 400 cases that are  
12:00:04 10 filed by close of business tomorrow. We can't even begin to  
11 pick the first 24 on each side without knowing whether those  
12 individual cases are going to opt in or opt out. And that  
13 process is going to take more time than we have built into the  
14 schedule.

12:00:23 15 THE COURT: What do defense counsel think?

16 MR. NORTH: Your Honor, I think it's a very  
17 perplexing problem, and I'm also always concerned about it  
18 because I believe that if you condition a case's participation  
19 in the bellwether process, condition that on a prior *Lexecon*  
12:00:38 20 waiver by the plaintiff, then you have a situation where it is  
21 easy for the plaintiffs to manipulate the bellwether pool to  
22 those cases they want.

23 So it's a very perplexing problem if you try to limit  
24 it in that regard. I mean, I have not conducted a survey as  
12:00:57 25 to how other judges have handled this problem. I'm sure there

12:01:01 1 are other ways. The only experience I've had with that  
2 particular issue is one judge in a large MDL said that he  
3 would travel anywhere to try the case with that  
4 cross-designation thing, and then when the time came to try  
12:01:12 5 it, he made everybody know just how much happier he would be  
6 if he tried it on his home turf. The *Lexecon* issue went away  
7 there. That's the only experience I've had.

8 But I am concerned and think it could be very  
9 prejudicial to the defendants if the plaintiffs have the  
12:01:30 10 option -- if the plaintiffs are required to waive *Lexecon* or  
11 not waive *Lexecon* before being designated in the pool, then  
12 they have sole control over who goes into that pool.

13 THE COURT: Right. Let's do this. We've reached the  
14 noon hour. Tricia has been working for two hours. I have, on  
12:01:46 15 my chair in my office -- my mic is no longer working.

16 I have on my chair in my office a stack of half a  
17 dozen bellwether case management orders from other MDLs. I'm  
18 going to look at those over the lunch hour and see what they  
19 did with *Lexecon*. Why don't you all think about it. Let's  
12:02:06 20 take up this topic again at 1 o'clock. There's legitimate  
21 issues on both sides. But I think we need to do something in  
22 connection with it rather than just postpone this issue until  
23 later.

24 So we'll see you at 1 o'clock.

12:02:21 25 MR. NORTH: Thank you, Your Honor.

12:02:23 1 MR. STOLLER: Thank you, Your Honor.

2 (Recess taken from 12:02 to 12:55.)

3 THE COURT: Thank you. Please be seated.

4 All right. Counsel, did any of you have additional  
13:00:50 5 thoughts on this *Lexecon* issue over the lunch hour?

6 MR. STOLLER: I don't think anything beyond what we  
7 raised before, Your Honor.

8 MR. NORTH: Nothing further, Your Honor.

9 THE COURT: I looked at several different case  
13:01:05 10 management orders, and there have been a variety of approaches  
11 applied. Some simply say that the only cases eligible for the  
12 bellwether pool are cases where *Lexecon* has been waived.

13 Some set a date by which a plaintiff that's assigned  
14 to the bellwether pool must affirmatively say they are not  
13:01:47 15 waiving *Lexecon*, and the order says if they don't  
16 affirmatively say it by that date, then they're deemed to have  
17 waived *Lexecon*.

18 And the orders go on to say that if a party asserts  
19 *Lexecon* and the defendant agrees that it has the right to do  
13:02:06 20 it, then the defendant picks a replacement case for the pool.  
21 I saw two orders that did that.

22 There was one where plaintiffs' lead counsel agreed  
23 to waive *Lexecon* with respect to all of the cases where they  
24 were counsel. And agreed to try to persuade other plaintiffs'  
13:02:40 25 counsel to waive *Lexecon*, and the order said something like,

13:02:43 1 The Court strongly urges counsel to waive *Lexecon*. So the  
2 Court was weighing in.

3 And it went on to say that when the pool was created,  
4 plaintiffs could only put cases in the pool where *Lexecon* had  
13:03:01 5 been waived. Defendants could pick whatever cases it chose,  
6 and if *Lexecon* became a problem in one of those later and the  
7 judge couldn't persuade them to waive *Lexecon*, then the  
8 defendants could pick a replacement.

9 There is a statute, 28 U.S.C. Section 292(d), that  
13:03:23 10 allows a district judge to be designated to try a case in  
11 another circuit. But it requires the approval of the chief  
12 judge of that circuit and the chief justice of the  
13 United States.

14 But there are some orders where the Court said I'll  
13:03:41 15 obtain an approval to try the case in the transferor district,  
16 if necessary.

17 There are a couple of others that obviously looked  
18 like they were cases with thousands or tens of thousands,  
19 where they said the bellwether cases will be chosen from cases  
13:04:03 20 filed in this state, and there was apparently a large enough  
21 pool they could pick a good sample of bellwethers out of that.

22 Those were the alternatives I saw in the various  
23 orders I looked over.

24 Any thoughts on how we ought to proceed in light of  
13:04:23 25 that information?

13:04:26 1 MR. STOLLER: Your Honor, Paul Stoller. My only  
2 thought is it seems to me there are only two, from my  
3 perspective, options that I think are workable and appealing.  
4 And one is that *Lexecon* is not an issue, in which case you  
13:04:39 5 avail yourself of the ability under 18 U.S.C. 292(d) to be  
6 designated and try cases in other jurisdictions; or if we're  
7 going to require that bellwether cases be those that are tried  
8 here and waive *Lexecon*, then it needs to be very early in the  
9 process.

13:04:56 10 I think it becomes very difficult to get far down the  
11 road into a bellwether process and then have a deadline or a  
12 date by which *Lexecon* is going to be waived, and then lose  
13 certain cases that we've put into the process. The work  
14 product that went to them becomes wasted, and then you get  
13:05:14 15 into a situation of potentially having, if you take the  
16 scenario that you talked about where if the plaintiff doesn't,  
17 defendant gets to choose. It skews the balance of what we  
18 tried to put together in the proposed bellwether process of  
19 having representative cases that are put forth by each side.

13:05:35 20 So my proposal would only be whatever you do, Judge,  
21 is that we either don't make *Lexecon* an issue, which I think  
22 would be our preference, but obviously deferential to your  
23 needs and your schedule, or that if we do so, it is something  
24 that happens early, that plaintiffs would need to do early  
13:05:54 25 *Lexecon* waivers to be considered to be part of the process so



13:05:57 1 that we don't get into it and have to make changes along the  
2 way.

3 MR. NORTH: Your Honor, we would certainly support if  
4 the Court was interested in taking that first approach, which  
13:06:08 5 is to designate -- or go through the cross-designation  
6 procedure, if necessary, to ensure that you try the cases.

7 I agree with Mr. Stoller that whatever's done needs  
8 to be done early in the process. I just don't believe it can  
9 be a situation where the plaintiff unilaterally gets to decide  
13:06:27 10 who is waiving *Lexecon* and who's not, and therefore determine  
11 the pool of eligible cases by their *Lexecon* decisions at the  
12 outset.

13 If we're going to go down that road of somehow having  
14 *Lexecon* waiver as a criteria, I think it needs to be done far  
13:06:47 15 enough along the process, maybe a month or so after the  
16 initial 48 are chosen, so that there's a real penalty to the  
17 plaintiffs if they tried to skew the pool at that point with a  
18 procedure like the Court mentioned a couple of cases had where  
19 there's a presumptive date and if you don't object *Lexecon*'s  
13:07:07 20 deemed waived, and if do you object and stand upon *Lexecon*  
21 rights, then the defendant has the right to replace that.

22 THE COURT: A number of the orders noted that  
23 defendants have to waive *Lexecon*, too.

24 I've never looked at the case law to know if that's  
13:07:31 25 true.

13:07:31 1 Do you know, Mr. North?

2 MR. NORTH: I'm sorry, I did not hear --

3 THE COURT: Some of the orders say defendants have to  
4 waive *Lexecon*, as well.

13:07:39 5 MR. NORTH: The defendants are prepared. My clients  
6 and I have had that discussion, and their experience in MDLs  
7 is they prefer to waive *Lexecon* and have the judge that's  
8 presided over the proceedings try the cases.

9 THE COURT: Okay. Mr. Stoller.

13:07:56 10 MR. STOLLER: I was going to agree that the  
11 defendants have the right to waive *Lexecon*.

12 In response to Mr. North's statement, the decision to  
13 waive *Lexecon* is not a decision that the three of us are going  
14 to make. It's an individual plaintiff's choice. We've got  
13:08:09 15 some plaintiffs who can't travel for -- they're wheelchair  
16 bound and things of that nature. And it's always going to be  
17 a plaintiff-by-plaintiff issue.

18 Again, I'd prefer to resolve that early because I  
19 don't want to get into a situation where somebody chooses a  
13:08:26 20 plaintiff for inclusion, whether it's the initial 48 or the  
21 first 12, which would be for discovery, which I think would be  
22 very problematic, but that that -- we get down the road into  
23 that case a bit, and then what happens is we now reach a  
24 deadline and we lose some number of plaintiffs for reasons  
13:08:44 25 that aren't obvious in the first instance to the case, that

13:08:47 1 they can't travel, that they won't travel, and those sorts of  
2 things.

3 And then, again, to the extent we've tried to create  
4 system that has balance to it, it becomes unbalanced. I think  
13:08:57 5 if we're going to have *Lexecon* waivers required as part of the  
6 bellwether process, it needs to be before we get into the  
7 selection process.

8 THE COURT: What is your response to Mr. North's  
9 concern that if we only put into the pool plaintiffs who have  
13:09:10 10 waived *Lexecon*, the plaintiffs get to pick the pool?

11 MR. STOLLER: Well, plaintiffs always get to  
12 self-select, whether they waive *Lexecon* or not. And that's  
13 not an issue, again, that I can control.

14 To the point that he said that we would organize and  
13:09:26 15 orchestrate something where only the best cases waive *Lexecon*  
16 and others do not, I think that puts a little of a nefarious  
17 spin on what we do, but I also understand that that's a  
18 concern that people in the defense chair would have in that  
19 position. And that's why some judges don't go that route.

13:09:44 20 But I think it becomes an unfair proposition when you  
21 push us into a process and say, well, the *Lexecon* waiver comes  
22 later, and now we're going to start changing what has been  
23 attempted to be a fair and balanced process.

24 So to me, it either needs to be something we handle  
13:10:00 25 right at the beginning or it doesn't take place at all. And

13:10:03 1 we're amenable to whichever you choose, but I think if we  
2 start putting dates in the middle, that becomes a big problem.

3 MR. LOPEZ: Your Honor, unfortunately, we're in a  
4 state where one of the defendants is, so we -- the Arizona  
13:10:20 5 plaintiffs are basically -- you know, I mean, that would be  
6 ideal. And I've been involved in many bellwether processes,  
7 Your Honor. But the real issue is getting your client who is  
8 in Oklahoma to go anywhere. Especially people that are  
9 elderly or ill or for whatever reason.

13:10:38 10 Maybe there's a way for us to solve the Arizona  
11 residence issue with the defense. I think maybe give us an  
12 opportunity to have a discussion with them about that, where  
13 we can at least find some folks that are local, where it might  
14 be a little easier. At least if that's going to be the reason  
13:10:58 15 we're going to get resistance from our clients to not want to  
16 try their cases in Phoenix, Arizona.

17 But I think what we're saying is we endorse the idea  
18 that you should be trying the bellwether cases. And to the  
19 extent we can control that process, with not only the lawyers  
13:11:12 20 we have to deal with, but the clients, wherever they may be,  
21 in their desire. We understand that we've got to figure out a  
22 way to do that.

23 THE COURT: Well, why don't we do this. I would like  
24 you to take the bellwether stipulation and submit it as a case  
13:11:47 25 management order with the fact sheets attached. Let's say

13:11:51 1 you'll do that by a week from tomorrow. And confer between  
2 now and then and see if you can agree upon how to address this  
3 issue. If you can't agree, just note in the case management  
4 order, have a paragraph that deals with *Lexecon* waivers, and  
13:12:08 5 just say the parties disagree and state your disagreement.

6 I'm going to talk with a couple of judges who I know  
7 have dealt with this issue before in the meantime, get their  
8 thoughts.

9 And when I enter that order, I will either adopt a  
13:12:25 10 procedure that you all have agreed to, or, if you haven't  
11 agreed to, one that I think is fairest to both parties, and it  
12 may include using 28 -- or 292(d).

13 My concern about 292(d), frankly, is that my ability  
14 to try a case in Oklahoma depends upon both the chief judge of  
13:12:45 15 that circuit and the chief justice. I think the chief justice  
16 would agree if it's part of an MDL, but if the chief judge of  
17 the district has a plaintiff in Oklahoma saying no, I want it  
18 to be tried by a local judge, I don't know if they'd agree.  
19 So we don't fully control that either. But at least it gives  
13:13:10 20 us some greater measure of control.

21 So why don't you talk, see if you can find a way to  
22 do it. And include it in that proposed order, which I'll look  
23 over when it gets filed.

24 MR. NORTH: Your Honor, I'm not trying to be  
13:13:23 25 difficult and I agree with the procedure, but I just want to

13:13:25 1 make one point for the record.

2 I stand by the notion that my client is willing to  
3 waive *Lexecon*. I just don't want that to be construed as an  
4 irrevocable waiver right now, because if we were to develop a  
13:13:38 5 situation where this just simply -- we choose the bellwether  
6 pool at the outset only from those cases that where *Lexecon*  
7 has been waived and they have that power to determine, my  
8 client might want to retain that power, too, and not waive it.

9 THE COURT: All right. That's on the record.

13:13:58 10 Let me talk about a couple other matters related to  
11 this bellwether process.

12 You indicated in Docket 923 that you are going to get  
13 me by March 15th a stipulation on joint records collection,  
14 which we did not receive, that I've been able to see. Do you  
13:14:17 15 know where that stands?

16 MR. DALIMANTE: I can address that, Your Honor.  
17 John Dalimante.

18 I've been putting together an agreed upon order. We  
19 seem to be in agreement on everything. The only reason why it  
13:14:38 20 hadn't been submitted is my last conversation that I had with  
21 Taylor Daly from defense counsel's office was that she wanted  
22 to wait for the defendant -- the plaintiff fact sheet order to  
23 come down so that we can then work something out on the order.  
24 There was just tweaking it a little bit. We can probably have  
13:14:57 25 something filed by next Friday. We're 99 percent of the way

13:15:02 1 there.

2 THE COURT: Okay. I'll just say in my order that  
3 that will come in by next Friday.

4 MR. DALIMANTE: Thank you, Your Honor.

13:15:22 5 THE COURT: I want to make sure I understand the  
6 procedure.

7 So there's this initial plaintiff pool, which is all  
8 cases as of April 1st. You then exchange lists of 24 to come  
9 up with a group of 48. You provide the initial sheets of  
13:15:44 10 disclosure to each other for those within the next 60 days.  
11 And it sounds like you then go collect records for all 48  
12 people in the pool. You think that will take potentially  
13 until December 1st.

14 Then it says that on December 10th, you exchange  
13:16:08 15 lists of ten. So there will be 20 of the 48 to pick, half by  
16 the plaintiffs, half by the defendants. Each side picks four  
17 cases from the other side's list of ten. So that gives us  
18 eight.

19 And then you say you meet and confer to see if you  
13:16:30 20 can pick another four. I'm assuming from the remaining 12 in  
21 that list of 20; is that right?

22 MR. STOLLER: Correct, Your Honor.

23 THE COURT: And if you can't, then I pick those four  
24 in the procedure you've described. And that 12 becomes  
13:16:47 25 discovery group one, which you anticipate will need a couple

13:16:52 1 of months of discovery.

2 And then the bellwether cases are picked from that  
3 discovery group of 12; is that correct?

4 MR. NORTH: Yes, Your Honor.

13:17:16 5 THE COURT: You say out of those 12, each side will  
6 present a list of six.

7 MR. DALIMANTE: That's assuming, Your Honor, we don't  
8 agree. In theory, we could come out of the 12 and say we  
9 agree on four, and then we would just submit the last two to  
13:17:28 10 you.

11 THE COURT: Okay. The way it's read now -- the way  
12 it reads now, I believe, is on March 1st, you exchange lists  
13 of six, and then you meet to see if you can agree on six from  
14 the list. Well, if each present lists of six, that's the 12  
13:17:46 15 in the group. I suppose you --

16 MR. STOLLER: In theory, we could have overlap.

17 THE COURT: If there's overlap. Okay.

18 A couple of questions on the actual stipulation that  
19 you filed, which is at Docket 1153. It's the one you filed on  
13:19:15 20 March 18th. It's titled Stipulation and Filing Regarding  
21 Proposed Procedure for Party Fact Sheets.

22 In paragraph 2(A)(3)(d) on page 3, it says,  
23 "Plaintiffs shall sign the PFS," which is the plaintiff fact  
24 sheet, "and provide an executed affidavit attesting that the  
13:19:58 25 information contained therein is true and correct."



13:20:03 1 Is that affidavit somehow different from the  
2 verification that you've actually put at the end of the fact  
3 sheet?

4 MR. LOPEZ: No, Your Honor.

13:20:12 5 THE COURT: I just think that might be confusing.  
6 You might want to revise that in the standard order you  
7 provided because you've got a verification right there at the  
8 end of the fact sheet and saying an executed affidavit sounds  
9 like a separate document.

13:20:29 10 In paragraph 2(A)(4) on page 4 of your submission,  
11 you talk about what happens if deficiencies in the fact sheet  
12 have not been cured, and you say on lines 6 and 7, "The  
13 parties will submit the dispute to the Court in a manner to be  
14 prescribed by the Court."

13:20:58 15 When you submit this, just revise that to say, "The  
16 parties shall place a joint conference call to the Court," and  
17 we'll talk through how we can how most quickly get it resolved  
18 rather than you asking me at that point how to resolve it.

19 And do the same thing on lines 21 and 22 on page 4.

13:21:23 20 On page 5, paragraph C(1), you say that, "Plaintiffs  
21 will execute and provide defendants with the record  
22 authorizations agreed upon by the parties."

23 Have you agreed upon the authorizations?

24 MR. DALIMANTE: Your Honor, those are the  
13:21:39 25 authorizations that we're working on that I mentioned earlier.

13:21:42 1 We hope they have those all taken care of by next week.

2 THE COURT: So is that what you're going to include  
3 in what you called the stipulation on joint records  
4 collection?

13:21:54 5 MR. DALIMANTE: Yes.

6 THE COURT: Okay. That's fine.

7 In the fact sheet itself, page 5 of the fact sheet  
8 that's attached to Document 1153, it's titled Claim  
9 Information Section 2, paragraph 1, I saw on the chart earlier  
13:22:45 10 that there's now one that's Simon Nitinol filter case, so I  
11 don't know if you want to add that to the list, or maybe put  
12 that in as "other." But since we've now got a case on that,  
13 you might just want to put it in the list.

14 Page 10, paragraph 10(B). Is it clear that all of  
13:23:11 15 the plaintiffs counsel working with their clients on this will  
16 understand what filter struts are?

17 MR. STOLLER: The lawyers certainly will, Your Honor.

18 THE COURT: Okay.

19 Page -- if you look at Page 6 of the fact sheet,  
13:23:48 20 question 6, and you look at page 22, question 11, they're  
21 really the same, it appears to me. They're both asking if  
22 you've had any other filters implanted. Just seems to me a  
23 little duplication. Maybe I'm missing the distinction, but  
24 you may want to combine those into a single question.

13:24:23 25 MR. STOLLER: We wouldn't disagree, Your Honor. This

13:24:25 1 is the form proposed by the defendants, and we are agreeable  
2 to it. If they're agreeable to take out one of those, it's  
3 certainly fine with us.

4 MR. NORTH: We'll clean that up, Your Honor.

13:24:38 5 THE COURT: Okay. On the defendants' fact sheet, at  
6 the bottom of page 1, you require that any documents that  
7 you're producing responsive to a question should be identified  
8 with a Bates stamp number. Do you want to do the same on the  
9 plaintiffs'? I didn't see it on the plaintiffs'. It's just a  
13:24:56 10 thought. Might be helpful to have them identify it by Bates  
11 number. Maybe that would happen anyway.

12 MR. STOLLER: I think the difference is, Your Honor,  
13 in terms of the defendants -- or plaintiffs, there's going to  
14 be a finite number of documents for each plaintiff. You know,  
13:25:09 15 they'll be John Smith 1 through 100, and whereas for the  
16 defendants, they've been using consecutively numbered --

17 THE COURT: I understand that. But my only point is  
18 to avoid any confusion, even if it's only 100 documents, you  
19 may want to identify them by Bates number if you're referring  
13:25:26 20 to them in the fact sheet.

21 MR. STOLLER: We don't have a problem with that.

22 MR. DALIMANTE: Your Honor, the only issue on that is  
23 that the joint collection of records. So we've agreed to use  
24 the defendants' vendor to collect those records. So the Bates  
13:25:47 25 numbers that those documents presumably -- just in my dealing

13:25:52 1 with them historically -- they're going to assign a Bates  
2 number to them that will be the defense Bates number, and when  
3 we get them, we may reproduce them or attach certain portions  
4 of them, but they will have that same reference.

13:26:06 5 THE COURT: That's fine. I guess my only point is if  
6 you're talking about a document in an answer, it should be  
7 identified by Bates number, whoever affixed it to it. And I  
8 just didn't see that on the --

9 MR. DALIMANTE: We can do that to the extent we  
13:26:19 10 already have the records and just produce it. In addition,  
11 too, we can assign the number, too.

12 THE COURT: Okay. A similar question for you to  
13 consider. At the end of the defendants' sheet, Page 8, it  
14 says at the top, "Please ensure that the production of  
13:26:43 15 documentation includes specific reference to the question to  
16 which the document is provided in response."

17 Consider whether you want plaintiffs to do the same  
18 thing. It's just a thought. I don't have a strong feeling on  
19 it.

13:27:06 20 Those are my thoughts on the fact sheet and the  
21 bellwether procedure. What I'd like you to do, then, is  
22 submit to me the stipulated order setting the bellwether  
23 procedures and, if necessary, identify your disagreement on  
24 *Lexecon* waiver in the paragraph.

13:27:24 25 And submit to me, I assume as a separate order, a

13:27:28 1 stipulated order on the fact sheets that includes the  
2 stipulations at the beginning of Document 1153, with the fact  
3 sheets attached, and I'll just enter those two orders so that  
4 we've got that in place.

13:27:42 5 MR. STOLLER: And we had discussed, Your Honor,  
6 merging those into a single order, if that's okay.

7 THE COURT: Yeah.

8 MR. STOLLER: I don't think it will be a problem for  
9 you.

13:27:50 10 THE COURT: No, it's not a problem for me. It will  
11 be a fairly long order. The order itself will be 12 or 15  
12 pages, and then have all of the fact sheets attached. But if  
13 it's easier to do it that way, that's fine.

14 MR. STOLLER: They had originally been one, but then  
13:28:09 15 we separated them into two for timing differences in terms of  
16 the filing of different orders --

17 THE COURT: That's fine.

18 Okay. Let me make a note here.

19 All right. Let's talk for a minute about a couple of  
13:29:02 20 other subjects. My Case Management Order Number 8 in  
21 Section 10 established a procedure for you to address  
22 depositions of previously deposed witnesses and to come up  
23 with any additional detailed procedures.

24 You said in your joint report that you would have a  
13:29:20 25 stipulated deposition protocol to me before today, but I

13:29:23 1 didn't see one.

2 MR. STOLLER: We're still in the process of  
3 negotiating that, Your Honor. We had a meeting on it and a  
4 couple of discussions. I anticipate we'll have something in  
13:29:33 5 the next week or ten days. We want to get that done because  
6 depositions are going to be starting relatively soon.

7 THE COURT: Shall we say April 15th?

8 MR. STOLLER: That's fine with us, Your Honor.

9 THE COURT: Okay.

13:29:58 10 I'm assuming from your joint report that after you  
11 met and talked about preservation issues, you were both  
12 satisfied that what needs to be preserved is being preserved.  
13 Is that fair?

14 MR. STOLLER: In terms of ESI, Your Honor?

13:30:16 15 THE COURT: Right.

16 MR. STOLLER: I think we knocked down the process  
17 there. It's part of the understanding what they have, it's  
18 hard to understand whether it's been preserved until we know  
19 what they had and then what they did to collect --

13:30:25 20 THE COURT: Well, what you said in the joint report  
21 was that you met and conferred and decided an order was not  
22 necessary given the common law duty that exists.

23 MR. STOLLER: Sorry. Different issue, then, that I  
24 was trying to address there. We didn't -- we met and decided  
13:30:36 25 we didn't think we needed to have a separate preservation

13:30:39 1 order in this case to address preservation issues, and that  
2 the existing common law obligations and obligations under the  
3 Rules of Civil Procedures as developed in the case law are  
4 sufficient to cover the parties in this lawsuit. And we  
13:30:52 5 didn't think we needed a separate protocol on it.

6 THE COURT: All right.

7 Agreed?

8 MR. NORTH: Yes, Your Honor, agreed.

9 THE COURT: All right. I've seen that the defendant  
13:31:05 10 has filed a memorandum about the propriety of addressing  
11 equitable tolling. I'm assuming that will just get briefed in  
12 the normal course and plaintiffs are planning to respond?

13 MR. STOLLER: That's correct, Your Honor.

14 THE COURT: Okay. After that's fully briefed, I'll  
13:31:25 15 look at it. And if I think we need argument, I'll let you  
16 know and get you on the phone.

17 By the way, while I'm thinking about it, I started  
18 this morning by mentioning the case that involved  
19 Ms. Noterman, the deceased plaintiff. My judicial assistant  
13:31:42 20 called her counsel, and her counsel indicated that her husband  
21 has been designated as the executor of the estate. The  
22 plaintiff wants to move to amend to name the estate as the  
23 plaintiff in this case, and they'll get that motion to amend  
24 filed within the next two weeks.

13:32:11 25 It seems to me in light of that, what we ought to do

13:32:13 1 is -- we'll make sure it gets filed; if it doesn't we'll call  
2 them back -- just have you respond to the motion to amend. If  
3 the defendants think the estate is not a proper plaintiff, you  
4 can oppose the motion to amend.

13:32:32 5 I'll keep on file the motion to dismiss for now, so  
6 that if I deny the motion to amend and she's an improper  
7 plaintiff, we can dismiss the case. But it seemed to me just  
8 having you respond to the motion to amend and getting it  
9 briefed in that way was the easiest way to deal with it.

13:32:51 10 MR. NORTH: That's fine, Your Honor.

11 THE COURT: Okay.

12 In terms of depositions, you indicated in your joint  
13 report that three depositions had been scheduled for late May  
14 and early June, you're in the process of scheduling 12 months,  
15 you have a dispute regarding Brian Berry that you're talking  
16 about.

17 Has that been resolved, Mr. North?

18 MR. NORTH: I think we have resolved that, at least  
19 for the present time, Mr. Boatman and I have. And we now have  
20 seven scheduled, at least that are being scheduled fairly  
21 quickly.

22 THE COURT: Okay. Well, the question I wanted to  
23 raise, I was a little concerned there were only three  
24 scheduled and that those were already stretching into June.  
25 And I was going to ask do we need to block out deposition



13:34:02 1 weeks in the summer and double or triple track it to make sure  
2 we get everybody deposed? And it's really up to you as to  
3 whether that's necessary or you think you can get things  
4 scheduled. Recognizing we've got an October 28th fact  
13:34:16 5 discovery deadline.

6 MR. NORTH: Your Honor, we only received the list  
7 from them three weeks ago. We're getting these scheduled as  
8 fast as possible. In concept, what the Court proposes sounds  
9 good, but the problem is of the initial 16 I think they've  
13:34:30 10 named, only two are presently employed by the company. So 14  
11 of them are scattered to the winds, and obviously if we had  
12 say-so, we would try to get them all once at one location.  
13 But many of these people left the company five, eight, ten  
14 years ago, and we just don't have that sort of influence.

13:34:50 15 THE COURT: Well, are you confident, Mr. North,  
16 you'll be able to get the sufficient -- get the depositions  
17 scheduled sufficiently in advance of the discovery deadline  
18 not to create problem?

19 MR. NORTH: I think all of the depositions they've  
13:35:02 20 requested thus far, we'll have dates for them between now and  
21 the end of June, definitely.

22 There's one problem I think, and I just mentioned  
23 this to Mr. Boatman, we just discovered one witness is leaving  
24 today for six weeks in Europe. We had a hard time reaching  
13:35:17 25 her. She hadn't been with the company for seven years. We

13:35:20 1 finally found her yesterday, only to learn she's going to  
2 Europe for six weeks today.

3 But other than that, we are in touch with all of  
4 them, and we think we'll have dates for the remaining six or  
13:35:30 5 seven that we haven't given them, and those dates will take  
6 place between now and the end of June.

7 THE COURT: All right. At the next case management  
8 conference, if you think we need to do some block scheduling  
9 let me know and we'll get it in place so there's time to get  
13:35:46 10 the depositions done.

11 The only other issue I have is -- well, just two  
12 matters. One is to set the next case management conference,  
13 but also to just get a report on what, if anything, is  
14 happening in the state court litigation.

13:36:12 15 Can you give me a sense for what's happening with  
16 those cases? On either side.

17 MR. LOPEZ: Well, I know there's a case called  
18 *Austin*, that we may have mentioned before, that is -- has a  
19 case management order, a scheduling order, and we're  
13:36:28 20 coordinating with counsel. Plaintiff's counsel in that case  
21 are also on the plaintiffs' leadership committee. And that's  
22 the -- maybe Mr. North knows differently because there might  
23 be other cases, but that's probably the most active state  
24 court case. And we are trying to coordinate with that case  
13:36:50 25 from the standpoint of, you know, if we notice something,

13:36:52 1 they're going to coordinate with us. If they want to pursue a  
2 certain kind of discovery, because of their deadline we'll  
3 figure out a way to fit it into our schedule at the same time,  
4 even though theirs is probably a little more ambitious than  
13:37:05 5 what we have here, Your Honor.

6 That's the only state court case I'm aware of that  
7 has an ongoing scheduling order that's marked -- moving  
8 towards trial.

9 MR. DALIMANTE: We have two. We have two in the  
13:37:17 10 Maricopa County Superior Court. Those two cases, we have met  
11 with the judge and have agreed to track what is happening with  
12 this court. So that's all been coordinated.

13 MR. NORTH: I think that's accurate. There's only  
14 one case that any discovery is occurring in, that's the case  
13:37:40 15 Mr. Lopez mentioned. We are seeing an uptick in filings.  
16 We'll see where this leads us. We saw a case filed a couple  
17 of weeks ago in Missouri with ten plaintiffs joined from  
18 throughout the country in an effort to defeat diversity.

19 So we're seeing some uptick in state court cases, but  
13:37:58 20 as far as activity in them, that's the only one right now.  
21 And most of the others have agreed to sort of backseat what  
22 happens in the MDL.

23 THE COURT: Okay. My thought was that we ought to  
24 have the next case management conference in June. Does that  
13:38:22 25 make sense to people? Anybody see a need to do it earlier

13:38:25 1 than June?

2 MR. BOATMAN: Your Honor, we have depositions  
3 starting in May. To the extent we have issues on deposition  
4 protocol, it's the only thing -- and we can handle that by  
13:38:38 5 phone.

6 THE COURT: Right.

7 MR. BOATMAN: But that's the only issue I can think  
8 of that we would need to have resolved before. I think the  
9 first deposition's May 2nd.

13:38:51 10 THE COURT: Yeah. Okay. That's fine. I don't think  
11 it makes sense to set a case management conference before  
12 May 2nd. But if you have a disagreement, just call me and  
13 we'll get you on the phone within a few days so we can get  
14 those resolved.

13:39:10 15 (The Court and the courtroom deputy confer.)

16 THE COURT: Counsel, how does Wednesday, June 22nd,  
17 look to you all?

18 MR. NORTH: Your Honor, that could not be more  
19 perfect for me. We've got a deposition the day after that  
13:40:49 20 here.

21 THE COURT: All right. Let's set the next case  
22 management conference, then, for 10 a.m. on Wednesday,  
23 June 22nd. But, as indicated, if issues come up, feel free to  
24 call me before then.

13:41:09 25 What other matters do we need to address from

13:41:12 1 plaintiffs?

2 MR. NORTH: Your Honor, one mea culpa. Just when we  
3 have gotten to the Court and the Court has entered the amended  
4 case management order correcting the short-form complaint  
13:41:25 5 because of the omission of the jury demand, my client raised  
6 the fact with me -- which none of us had realized -- that the  
7 checkmarks for the -- which filter it is in the short-form  
8 complaint conflate into one line, G2X and G2 Express, even  
9 though they are different models of filters.

13:41:44 10 And so we're going to -- Ms. Kowalzyk from my office  
11 is working with Mr. Clark from their office to get a corrected  
12 short-form complaint that differentiates between the two, and  
13 we'll be submitting that soon.

14 THE COURT: Okay.

13:41:56 15 MR. NORTH: And I apologize for the confusion.

16 THE COURT: Okay. This is your last chance.

17 Any other issues we need to talk about?

18 MR. STOLLER: Not from plaintiffs, Your Honor.

19 MR. NORTH: None from defendants.

13:42:09 20 THE COURT: Okay. Thank you all. Travel safely.

21 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 11th day of April, 2016.

s/ Patricia Lyons, RMR, CRR  
Official Court Reporter